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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 81.

UNITED STATES OF AMERICA,
Appellant,

vs.

GEORGIA PUBLIC SERVICE COMMISSION,
Appellee.

BRIEF FOR THE GEORGIA PUBLIC SERVICE COMMISSION.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 81.

UNITED STATES OF AMERICA,
Appellant,
vs.
GEORGIA PUBLIC SERVICE COMMISSION,
Appellee.

BRIEF FOR THE GEORGIA PUBLIC SERVICE COMMISSION.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT.

On July 15, 1960, a regional director employed by the General Services Administration was requested by the United States Department of Public Health, Communicable Disease Center of Atlanta, Georgia, to negotiate with carriers for the establishment of economical rates and charges to cover a mass movement of household goods and personal effects of civilian employees of such Communicable Disease Center on transfer from Savannah, Georgia, to Atlanta, Georgia, and vicinity.[1]

[1] Record, p. 12, 2d par.

On July 27, 1960, the regional director invited fifty-four carriers to submit bids for such movement. In response to this invitation thirteen motor carriers submitted timely bids. Eight motor carriers quoted rates as published in a tariff filed with and approved by the Georgia Public Service Commission, and the other five motor carriers, including Consolidated Van & Storage Companies, Inc., submitted bids based on rates lower than those published in such tariff.[2]

Upon evaluating the bids, the regional director determined that Consolidated was the lowest responsive bidder and, consequently, awarded the contract to it on August 5, 1960.[3]

Subsequently, the Georgia Public Service Commission advised Consolidated, and the other four motor carriers who bid lower than the rates published in such tariff, that should they perform at the rates quoted the regional director, they would be in violation of the Commission's rules and subject to having their intrastate operating certificates revoked. By letter dated August 23, 1960, Consolidated advised the regional director that it would be unable to perform the services under the contract awarded August 5, 1960.[4]

Later, the regional director procured the movement of such household goods and personal effects at charges assessed and collected by a motor carrier pursuant to rates published in a tariff filed with and approved by the Georgia Public Service Commission.[5]

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[2] Record, p. 12, last par., p. 13.

[3] Record, p. 13, 2d par.

[4] Record, p. 13, 2d par.

[5] Record, p. 13, 4th par. The Appellant contends that it was "compelled to transport the approximately 43,670-pound shipment at the prescribed rates at an increase in cost of about 66 2/3% over the charges originally quoted by Consolidated" (Appellant's Brief,

The above rates paid by the United States were prescribed by a household goods commodity tariff filed with and approved by the Georgia Public Service Commission.[5] Household goods are a frequent item of transportation and, consequently, it is the general practice of governmental agencies regulating such transportation to adopt or approve commodity rates for household goods. Practically speaking, no household goods move at the higher class rates.

We should note that the household goods and personal effects involved in such movement constitute private property owned and used by civilian employees of the Federal Government and do not constitute property owned or used by the General Government. The movement originated from the private dwellings of such civilian employees at Savannah, Georgia, and terminated at their private dwellings in Atlanta, Georgia, and vicinity. Consequently, the movement did not involve an area under the exclusive jurisdiction of the Federal Government, nor did it involve an area rented, leased or otherwise held by it. Furthermore, such movement was wholly intrastate.

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p. 6, 2d par.). It is interesting to note that there was available to the regional director the services of a number of carriers having authority to transport household goods between the points involved at Commission-prescribed rates which would have produced even lower overall charges than those quoted by Consolidated. While the Appellant's exhibit at page 26 of the Record showing the charges paid on his movement does not show sufficient detail of the packing actually performed to here permit exact comparison of charges, it is apparent that based on the weights shown, the Appellant paid 65 per cent more in line haul freight charges alone than would have been charged under these lower Commission-prescribed rates. See certified copies of the order of the Georgia Public Service Commission in Docket 6840-A, and a representative list of carriers legally required to apply the rates and charges contained in that order, which documents have been lodged with the Clerk of the Supreme Court in the same manner as the Appellant has lodged a certified copy of Georgia Household Goods Tariff No. 1-B, GPSC-MF No. 3 (Appellant's Brief, p. 86).

[5] Record, p. 26, 9th line

SUMMARY OF ARGUMENT.

Part I of the Argument is devoted to a consideration of the jurisdictional aspect of this appeal as requested by the Court in its Order Postponing Jurisdiction of May 21, 1962.[7]

As to the merits, the Appellant contends, by virtue of the federal statutes and regulations referred to in Appendix B of its Brief, that Sections 68-613, 68-614 and 68-9911 of the Code of Georgia of 1933 are unconstitutional insofar as they confer upon the Georgia Public Service Commission the power to regulate the rates in contracts entered into by the United States with motor carriers for the movement of the household goods and personal effects owned by civilian employees of the United States Department of Public Health, when such movement is in intrastate commerce within the State of Georgia. The Appellant claims that the burden imposed upon it by state regulation is a direct interference with its activities.

The Georgia Public Service Commission contends to the contrary, and claims that the burden imposed upon the United States is indiscriminate and incidental.

The United States in its contention places chief reliance on *Public Utilities Commission of the State of California v. United States*[8] and the Georgia Public Service Commission in its contention places chief reliance on *Penn Dairies Inc., and the United States v. Milk Control Commission of the Commonwealth of Pennsylvania.*[9]

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[7] Record, p. 106.

[8] (1958), 355 U. S. 534, 2 L. ed. 2d 470, 78 S. Ct. 446, reh. den. 356 U. S. 925, 2 L. ed. 760, 78 S. Ct. 713.

[9] (1943), 318 U. S. 261-284, 87 L. ed. 748-761, 63 S. Ct. 617-628.

An exploration of the merits requires initially a search for the congressional intent, as reflected by the federal statutes and their legislative history. If this inquiry does not decide the case, then we must press on to a consideration of whether Georgia's program for the rate regulation of intrastate motor carrier transportation imposes any burden upon the United States which violates its implied immunity. The congressional intent aspect is considered in Part II of the Argument and the implied intergovernmental immunity aspect is considered in Parts III through V. Part VI embraces both aspects.

I.

The Georgia Public Service Commission contends that the Three-Judge District Court below was properly convened and that, consequently, this Court has jurisdiction of this direct appeal.

The jurisdictional aspect of this case turns on whether or not the Appellant's complaint, attacking the application of certain Georgia Code Sections regulating intrastate motor carrier transportation, incorporated a ground of "unconstitutionality" within the meaning of 28 U. S. C., Section 2281, which requires the convening of a three-judge district court, when a substantial ground of "unconstitutionality" is alleged.

The complaint alleged, inter alia, that the Georgia Code Sections directly violated various Clauses in Articles I and IV of the Constitution, exclusive of the Supremacy Clause. If this Court finds these grounds to be substantial, then they would independently constitute grounds of "unconstitutionality" within the meaning of 28 U. S. C., Section 2281, and hence, support the Court's jurisdiction of this direct appeal.[10]

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[10] *Query v. U. S.* (1942), 316 U. S. 486, 86 L. ed. 1616

The complaint further alleged that such Georgia Code Sections conflicted with certain provisions of the Federal Property and Administrative Services Act of 1949 and, hence, violated the Supremacy Clause. The Appellant and Appellee have resolved the preliminary question of the construction of Georgia Code Sections 68-623 and 68-614 by agreeing that the Georgia Commission asserts the right to regulate the rates governing the federally arranged transportation involved in this case. Consequently, "This case presents a sole, immediate constitutional question," as defined by *Kesler v. Department of Public Safety*[11] and, therefore, independently presents a ground of "unconstitutionality" within the meaning of 28 U. S. C., Section 2281, and, hence, supports the Court's jurisdiction of this direct appeal.

II.

The federal statutes relied upon by the Appellant, as applied to the facts in this case, require that the method of arranging rates be accommodated to the existing state regulatory framework.

The regional director in arranging the transportation of civilian owned goods in this case acted under the provisions of Federal Properties and Administrative Services Act of 1949 and supplemental administrative regulations, and the Appellant, in its assault upon the applicability of Georgia's regulation of such transportation, places its chief reliance upon the competitive bidding and negotiation provisions of such Act and regulations.

In *Penn Dairies*, this Court construed legislation and regulations analogous to those relied upon by the Appellant herein, and held in favor of state price regulation.

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[11] (1962), 369 U. S. 153, 158, 1st par., 7 L. ed. 2d 641, 647, 1 col., 1st par.

Furthermore, legislative history and a comparison between the language of the provisions construed in *Penn Dairies* and the provisions involved herein, reveal that the current provisions were derived from the earlier ones. It is a well recognized canon of construction that where statutory provisions which have been construed by this Court have been reenacted in the same, or substantially the same, language, the Congress is presumed to have been familiar with their construction and to have adopted it as a part of the law, unless a contrary intent clearly appears or a different construction is expressly provided for.[12]

Furthermore, other provisions of the Federal Property and Administrative Services Act of 1949 and other statutes of Congress unequivocally demonstrate the congressional intent to subjugate the Federal Government's interest in the lowest cost procurement of supplies and services to the higher interest in stabilizing and stimulating the national economy.

Manifestly, the Congress in enacting these procurement statutes did not intend the obtainment of unregulated rates, but the accommodation of the method of arranging rates to the existing state regulatory framework. Had its purpose been merely to insure low rates, it could easily have declared that competitive bidding and negotiation for government contracts should be unaffected by state regulation.

III.

An analysis of *Penn Dairies* and kindred decisions reveals that the imposition by a state of an indiscriminate and incidental burden upon the United States does not contravene its implied immunity.

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[12] *U. S. v. Dixon* (1954), 347 U. S. 381, 384, 2d par., 98 L. ed. 785, 1. col., 2d par., 74 S. Ct. 966.

Penn Dairies, *Alabama v. King & Boozer*,[13] *Graves v. New York ex rel. O'Keefe*[14] and other decisions clearly reveal that private contractors who merely have business or other relations with the United States are susceptible to state regulation, irrespective of the fact that an indirect, indiscriminate and incidental burden may be transmitted through them to the United States. These decisions also established the doctrine that the immunity of federal instrumentalities from the indirect affect of state regulation and taxation is a matter for the Congress to determine and that the judicial function is limited to the interpretation of the congressional will.

IV.

An analysis of *Public Utilities* and kindred decisions reveals that state action interfering with the exercise of a federal function contravenes the implied immunity of the Federal Government.

In *Public Utilities*, this Court held invalid, under the Supremacy Clause of the Federal Constitution, a California statute prohibiting carriers from transporting property owned by the United States at rates other than those approved by the California Public Utilities Commission on the ground that such statute interfered with the United States in performing its function of providing for the national defense.

In its opinion, this Court made it abundantly clear that it did not intend that *Public Utilities* would eclipse or devitalize the doctrine reflected by *Penn Dairies*. Furthermore, *Public Utilities* plainly did not announce any change in doctrine by this Court because of the three Michigan

[13] (1941), 314 U. S. 1, 86 L. ed. 3, 62 S. Ct. 43

[14] (1939), 306 U. S. 466, 83 L. ed. 977, 59 S. Ct. 595, 120 A. L. R. 1360

Cases[15] decided on the same day as *Public Utilities*, which relaxed the doctrine of intergovernmental immunity even further by limiting the immunity of private concerns engaged in work for the United States.

The rationale of *Public Utilities* is consistent with that expressed in *McCulloch v. Maryland*,[16] *Arizona v. California*,[17] *Johnson v. Maryland*[18] and other decisions. These decisions reflect the federal half of the implied intergovernmental immunity doctrine which absolutely immunizes the United States, together with its functions, property and instrumentalities, from any direct burden imposed by a state. However, these decisions do not in any manner immunize, from state regulation, private contractors who merely have business or other relations with the United States irrespective of the fact that an indirect, indiscriminate and incidental burden may be transmitted through them to the United States.

V

(A) The rate statutes and regulations do not place an unconstitutional burden upon the United States or its officers.

In attempting to fashion an unconstitutional burden, the Appellant first complains that the Georgia tariff provisions requiring that the "Property of two or more families or establishments will not be accepted for trans-

[15] *U. S. v. City of Detroit* (1958), 355 U. S. 466, 2 L. ed. 2d 424, 78 S. Ct. 474; *U. S. v. Township of Muskegon* (1958), 355 U. S. 484, 2 L. ed. 436, 78 S. Ct. 483; and *Detroit v. Murray Corp. of America* (1958), 355 U. S. 489, 2 L. ed. 2d 441, 466, 78 S. Ct. 458, 480.

[16] (1819), 4 Wheaton (U. S.) 316, 4 L. ed. 579.

[17] (1931), 283 U. S. 423, 75 L. ed. 1154, 51 S. Ct. 522.

[18] (1920), 254 U. S. 51, 65 L. ed. 126, 41 S. Ct. 16.

portation as a single shipment,"[19] unduly impedes the United States' ability to procure mass movements of household goods of its employees.[20]

The tariff in no way impedes mass movements, but merely requires that the rate be computed on an intrastate single shipment basis irrespective of the number of intrastate single shipments combined in a mass movement. Under any arrangement for transporting property for hire, there must be an evaluation of the character and weight of the property to be transported in order to compute the rates therefor, whether they be established by state regulation or arrived at by negotiation or competitive bidding. Consequently, the goods of each federal employee in a mass movement must be so evaluated and, thereupon, it is as easy to apply a state tariff as it is to apply a rate obtained otherwise.

Next, the Appellant complains that if it must abide by state rate regulation in intrastate commerce, it "would have one system covering shipments of household goods which cross State lines (or are within those States not seeking to regulate them), and, depending upon State legislatures, up to 50 systems governing intrastate shipments."[21] However, we should note that under the "cut-throat" competitive conditions sought by the Appellant, federal procurement officers would be continually negotiating and renegotiating rates and advertising and re-advertising for competitive bids on rates, which rates would be as infinite and varied as the number of carriers interested in doing business with the United States. In sharp contrast to this instability, is the state regulation of intrastate commerce under which the tasks of the fed-

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[19] Appellant's Brief, App. C, p. 85, last par.

[20] Appellant's Brief, pp. 44, 1st par.; 61, 1st par.

[21] Appellant's Brief, p. 60, last par.

eral procurement officers would be greatly simplified and expedited because only a relatively small number of governmentally-fixed rate systems would have to be applied.

In conclusion of this aspect of the case, it seems clear that the United States in acting in accord with Georgia's program of rate regulation is completely free to procure intrastate transportation in such volumes, for such destinations, and at such times as it desires. Therefore, such rate regulation imposes no prohibition on the United States or its officers.

(B) The criminal statute is inapplicable to federal officers.

In the lower court, the Appellant did not attack the criminal statute specifically or raise its applicability in this case. Consequently, the Georgia Public Service Commission was afforded no fair opportunity to place in evidence an affidavit to the effect that the criminal statute has never been utilized in the prosecution of a shipper or an agent acting in behalf of the shipper and that it has never been interpreted as to being applicable to shippers. The courts of Georgia accord great weight to administrative interpretation of statutes, and strictly construe criminal statutes against the state. Therefore, the attack comes too late at this stage of the litigation, and, even if we assume its timeliness, it would be inapplicable in the prosecution of shippers.[22]

In any event, it seems clear that a state criminal statute would have no applicability to a federal officer in the performance of his official duties. There is a clear distinction between a state, on one hand, imposing an indirect burden on the Federal Government by regulating carriers doing business with it, and, on the other hand, interrupting the

[22] *U. S. v. Farrar* (1930), 281 U. S. 624, 74 L. ed. 1078, 50 S. Ct. 425, 68 A. L. R. 802.

acts of the Federal Government by arresting a federal officer in the performance of his official duties, the latter of course being constitutionally prohibited.[23] Even if a state should attempt to so apply such a statute, there would be time enough to properly dispose of such an attempt.

VI.

Penn Dairies and *Public Utilities* are in harmony and the facts in this case are governed by *Penn Dairies*.

The doctrine evinced by *Penn Dairies*, *King & Boozer*, *Draco*, *O'Keefe* and analogous decisions demonstrate that an indiscriminate and incidental economic or administrative burden placed on the United States as a result of state regulation or taxation is not unconstitutional, provided there is no clear congressional intent shown to immunize against such a burden. The congressional immunization question is foreclosed in this case because the statutes considered herein are analogous to those construed by the Court in *Penn Dairies*. Under such circumstances, the amount of the economic burden is not a determining factor as is illustrated by the tax decisions which resulted in enormous economic burdens being placed on the United States.

When the United States avails itself of an intrastate transportation system regulated by a state, the United States should pay its fair share of the cost necessary to adequately maintain such a system. The theory of state regulation of rates is to fix them at the lowest reasonable level necessary to maintain the economic stability of the industry regulated. The United States is the biggest spender in the Nation. To permit this tremendous economic force to penetrate the rate floors established by state

[23] *Cunningham v. Neagle* (1890), 135 U. S. 1, 34 L. ed. 55, 10 S. Ct. 658.

regulation would stimulate destructive competition in a regulated industry. The effect would be a heavy economic depressant operating on a national scale. Should such a result be readily inferred from congressional legislation? The Court has answered the question in the negative on numerous occasions.

In this case, as in *Penn Dairies*, the price regulation affects the United States only by increasing the price it pays. In *Penn Dairies* the Court recognized that the control of prices in the milk industry is clearly within the police power of the states since the public health is so directly affected. In this case, the regulation of rates in the intrastate transportation industry is also clearly within the police power of the states because the adequacy of the industry and its consequent ability to properly serve the general public is directly affected. The burden placed on the United States is only incidental to the enforcement of state milk and motor carrier regulations and the increased cost in each case is not one which was expressly made to discriminate against the United States, nor is it one which interferes with the performance of a federal function.

In *Public Utilities*, the state had enacted legislation which directly regulated the United States, by name, when it should apply for reduced rates for the transportation of property. The state statute provided that "The (state) commission may permit common carriers to transport property at reduced rates for the United States . . . to such extent and subject to such conditions as it may consider just and reasonable." The legal effect of such a statute is to place the United States under the heel of the state when applying for reduced rates. When a state formally addresses its regulation to the United States the burdens presented are no longer indirect, indiscriminate or incidental in the constitutional sense, irrespective of how

favorable such an address might be in a purely economic sense. This direct interference by a state with the United States was relied on heavily in the decisions of the lower Court and this Court in *Public Utilities*.

By contrast, the Georgia statutes do not name the United States, but operate indiscriminately upon all shippers. The Georgia statutes do not interfere with the procurement of transportation by the United States, but merely impose an indiscriminate and incidental burden on it.

Next, we should note that in *Public Utilities* the property being transported consisted of military weapons and supplies. The District Court and this Court interpreted the state regulation as interfering seriously with the flexibility, speed and security requirements of moving military property. This is a crucial consideration during the current Cold War when espionage is being conducted in this Country by foreign powers. The opportunity for total war or limited conflict is ever present. Never in our history have the needs of immediate national defense been so synonymous with national survival. Obviously, a state cannot interfere with the United States in the performance of its paramount responsibility of providing for the national defense.

By contrast, this case involves the intrastate transportation of the household goods and personal effects of civilian employees of the United States Department of Public Health. The movements here are remote from the considerations of national defense as compared with the military movements in *Public Utilities*. In this case, the national interest is more concerned with the maintenance of an economically sound commercial transportation system and its effect on the national economy and defense, than with the indiscriminate and incidental burden placed on the United States. The District Court dramatically illustrated this distinction when it opined that "There

is a constitutional difference between a milk can and a hydrogen bomb!"[26]

Furthermore, Public Utilities involved the transportation of substantial quantities of exotic military weapons and supplies for which no commodity rates had been devised. Consequently, under the California regulations such military property would have to move under the higher class rate. On the other hand, the vast majority of private property moves at commodity rates because such property involves the common articles of commerce for which commodity rates have been devised. Therefore, the effect of such rate classification by California would impose a substantial economic discrimination against the United States in comparison with private shippers because of the uniqueness of much of the military property transported.

By contrast, this case involves the transportation of household goods and personal effects which are frequent items of commerce throughout the Nation. Georgia, like all the states which regulate the rates for the transportation of property, has devised commodity rates. Consequently, the economic burden imposed upon the United States is the same burden imposed upon private shippers.

The *Penn Dairies* doctrine is essential in preserving the vitality of our dual form of government, just as the *Public Utilities* doctrine is essential in prohibiting state interference with the performance of federal functions. The two doctrines coexist under our Federal Constitution. The over-expansion of either doctrine results in debilitating the desired vitality of the governmental victim.

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[26] *United States v. Public Utilities Commission of the State of California* (D. C.—N. D. Cal.—1956), 141 F. Supp. 168, 180, 1st col., 2d par.

ARGUMENT.

I.

The Three-Judge District Court Was Properly Convened So as to Justify This Direct Appeal to This Court.

This Court by Order of May 21, 1962, postponed the question of jurisdiction until a hearing of the case on the merits and requested counsel "to brief and argue, in addition to the merits, the question of this Court's jurisdiction on direct appeal under 28 U. S. C., § 1253."[27]

Section 1253 provides for direct appeal to this Court from the grant or denial of injunctive relief in any civil action required "to be heard and determined by a district court of three judges." Consequently, this Section leads us to the construction of 28 U. S. C., Section 2281, as to whether this case is one required by it to be heard and determined by a three-judge district court and, hence, whether this Court has jurisdiction of this direct appeal under Section 1253.

Section 2281 provides that injunctive relief against the enforcement of any State statute "shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined" by a three-judge district court. Therefore, we must determine if the Appellant's complaint challenged the Georgia Code Sections on grounds of "unconstitutionality" within the meaning of Section 2281.

The complaint attacked the validity of the Georgia Code Sections in the following terms:[28]

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[27] Record, p. 106.

[28] Record, p. 5, par. VI.

The United States avers that insofar as the various sections of the Georgia Statutes cited above empower The Georgia Public Service Commission to prescribe the rates for shipments of property for the United States between points in Georgia, they are unconstitutional and void under Article VI, Section 2 of the Constitution of the United States in that:

1. For no valid reason within the police powers or other reserved powers of the State of Georgia, they place an unreasonable burden and impediment on the United States in the discharge of its constitutional powers and responsibilities under Article I, Section 8, Clauses 7, 12, 13, 16 and 17, and Article IV, Section 3, Clause 2, of the Constitution of the United States.

2. They place an unreasonable burden on interstate commerce in an area under the exclusive jurisdiction of the Congress of the United States pursuant to the provisions of Article I, Section 8, Clause 3, of the Constitution of the United States.

3. They contravene the policy of Congress implicit in the *Federal Property and Administrative Services Act of 1949*, Public Law 1952, 81st Congress, 1st Session, Sections 201 and 202, 63 Stat., at page 377, relating to the negotiation for the transporting of property for the United States and the regulations of the various departments and agencies of the United States issued pursuant thereto.

Obviously, subparagraphs 1 and 2 above allege direct violations of the Federal Constitution which, if substantial, require the convening of a three-judge district court.[29]

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[29] *Query v. U. S.* (1942), 316 U. S. 486, 86 L. ed. 1610; *Stratton v. St. Louis Southwestern Railway Co.* (1930), 282 U. S. 10, 75 L. ed. 135; *Ex Parte Northern Pacific Railway Co.* (1932), 280 U. S. 142, 74 L. ed. 233; *Louisville & Nashville Railroad Co. v. Garrett* (1913), 231 U. S. 298, 58 L. ed. 229.

Subparagraph 3 alleges a conflict between the Georgia Code Sections attacked and the Federal Property and Administrative Services Act of 1949 and supplemental administrative regulations which also requires the convening of a three-judge court as discussed later in this subdivision of the Brief. By virtue of these allegations, the Three-Judge District Court below was convened under Section 2281.[30]

Subsequently, the Appellant, in response to the District Court's order granting the Appellee's Motion for More Definite Statement, eliminated the issue involving the State regulation of rates charged by carriers for the intrastate transportation of property owned by the United States and limited the allegations of the complaint to the following issue:[31]

> Are the pertinent sections of the Georgia statute unconstitutional insofar as they confer upon the Public Service Commission of Georgia the power to regulate the rates in contracts entered into by the United States with carriers in Georgia for the carriage of the household goods and personal effects of personnel of the United States when the contract is the contract of the United States and the United States assumes the sole responsibility of paying the carrier for the carriage by the terms of the contract.

The term "personnel of the United States" refers to employees of the United States Department of Public Health,[32] which is of course a non-defense agency.

The limitation of the allegations of the complaint to the above issue has largely, if not completely, debilitated

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[30] Record, p. 19.

[31] Record, p. 75.

[32] Record, p. 12, 2d par.

the attacks alleged in subparagraph 1 of paragraph VI of the complaint[33] concerning the impediments such Georgia Code Sections place upon congressional power to establish post-roads,[34] to raise and support armies,[35] to provide and maintain a navy,[36] to provide for the militia,[37] to exercise exclusive legislation over real property held by cession,[38] and to make all needful rules and regulations respecting property belonging to the United States.[39] Of course, if this Court should determine that any of these constitutional powers presents a substantial question as applied to this case at this stage of the litigation, then such question would constitute a ground of "unconstitutionality" within the meaning of Section 2281, thereby independently sustaining this Court's jurisdiction on direct appeal under Section 1253.[40]

Furthermore, the attack alleged in the succeeding subparagraph 2[41] concerning the burden such Georgia Code Sections place on interstate commerce[42] has been abandoned by the Appellant due to the inadequacy of the Record.[43]

The remaining ground on which the validity of such Georgia Code Sections is challenged is alleged in sub-

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[33] Record, p. 5.

[34] U. S. Const., Art. I, Sec. 8, Cl. 7.

[35] Id., Cl. 12.

[36] Id., Cl. 13.

[37] Id., Cl. 16.

[38] Id., Cl. 17.

[39] U. S. Const., Art. IV, Sec. 3, Cl. 2.

[40] See cases cited in ftn. 29, supra.

[41] Record, p. 5, Par. VI.

[42] U. S. Const., Art. I, Sec. 8, Cl. 3.

[43] Appellant's Brief, p. 26, ftn. 10, 2d par.

paragraph 3 of paragraph VI of the complaint concerning the conflict between them and the Federal Property and Administration Services Act of 1949 and supplemental administrative regulations. The parties have resolved the preliminary question as to the statutory construction of Georgia Code Sections 68-613 and 68-614 because the Appellant has alleged and the Appellee has admitted that the Appellee asserts the authority under such Code Sections to regulate the rates which motor carriers may charge for the intrastate transportation of household goods of personnel of the United States when the transportation is arranged by the United States,[44] and, furthermore, the parties have agreed that a real controversy exists between them as to the legality of the state regulation of the transportation of such household goods.[45]

In this posture, "This case presents a sole, immediate constitutional question" as defined by *Kesler v. Department of Public Safety*[46] and, hence, the alleged conflict between state and federal legislation, predicated upon a violation of the Constitution by virtue of the Supremacy Clause, constitutes a ground of "unconstitutionality", required to be heard and determined by a three-judge district court convened under Section 2281.

Therefore, the lower court, so convened, supports the jurisdiction of this Court on direct appeal under Section 1253.

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[44] Record: complaint, p. 3, par. IV, p. 5, par. V; answer, p. 88, par. 4, p. 89, pars. 5 and 6.

[45] Record: complaint, p. 6, par. VII; answer, p. 89, par. 7.

[46] (1962), 369 U. S. 153, 158, 1st par., 7 L. ed. 2d 641, 647, 1 col. 1st par.

II

The Statutes Relied Upon by the Appellant, as Applied to the Facts in This Case, Require That the Method of Arranging Rates Be Accommodated to the Existing State Regulatory Framework.

In challenging the application of state price regulation to the federal procurement of the transportation involved in this case, the Appellant relies upon certain provisions of the Administrative Expenses Act of 1946,[47] the Career Compensation Act of 1949,[48] the Federal Property and Administrative Services Act of 1949,[49] and an Act of 1956 revising certain Armed Services Procurement provisions.[50]

Initially, we should note that none of these statutes expressly provide for the immunization of the procurement activities of the Federal Government from state rate regulation, irrespective of the fact that all of the statutes were enacted subsequent to *Penn Dairies*, but prior to *Public Utilities*. We should also recognize that the statutes were enacted in an atmosphere of government regulation of business which widely involved direct price fixing by legislative enactment by both the federal and state governments, for the purpose of stabilizing and stimulating various segments of the economy.

In its challenge, the Appellant places chief reliance upon the competitive bidding and negotiation provisions of the Federal Property and Administrative Services Act of 1949 and an Act of 1956 revising certain Armed Services Pro-

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[47] 60 Stat. 806, as amended, 5 U. S. C., Sec. 73b-1.

[48] 63 Stat. 816, as amended, 37 U. S. C., Sec. 253 (a).

[49] 63 Stat. 383, 393-397, as amended, 40 U. S. C., Sec. 481, 41 U. S. C., Secs. 251-260.

[50] 70A Stat. 127-133, 10 U. S. C., Secs. 2301-2314.

curement provisions.[31] Each Act, in substantially the same language, establishes competitive bidding as the general policy governing procurement, but permits negotiation in cases, inter alia, where the public exigency will not permit the delay incident to advertising, or where it is impracticable to secure competition, or where the bid prices are unreasonable or were not independently reached in open competition.[32] The Appellant contends that these provisions reveal a congressional intent to immunize federal procurement from state price regulation.

However, this contention has been thoroughly considered and rejected by this Court in *Penn Dairies* which involved the construction of statutory provisions substantially the same as those mentioned in the 1949 and 1956 Acts. In fact, such provisions of these later Acts were derived from the statutory provisions construed in *Penn Dairies*.[33] In

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[31] An extract of such provisions is printed in Appellant's Brief at pages 72 through 74. Reliance upon the 1956 Act is misplaced because the regional director in arranging the transportation involved in this case acted under the 1949 Act (R. p. 12, 2d par.).

[32] Compare 10 U. S. C., Sec. 2305 (c), with 41 U. S. C., Sec. 253 (b), as to competitive bidding, and compare 10 U. S. C., Sec. 2304 (a) (2) (10) (15), with 41 U. S. C., Sec. 252 (c) (2) (10) (14), as to negotiation.

[33] The procurement procedures established by an Act of 1956 revising certain Armed Services Procurement provisions and the Federal Property and Administrative Services Act of 1949 were patterned after those established by the Armed Services Procurement Act of 1947 (62 Stat. 21). As to derivation of the 1956 Act, see 70A Stat. 1, 127, and as to the derivation of the 1949 Act, see House Report No. 670, dated May 24, 1949, in the 81st Cong., 1st Sess., with pertinent provisions reproduced in U. S. Code, Cong. Ser. (81st Cong.—1st Sess.—1949) at pp. 1475, 1479, last par., 1490 (a) (c) (2), and 1498 (c) (13). In turn, the pertinent provisions of the 1947 Act were derived from Sec. 3709 of the Revised Statutes and the Appropriation Act of March 2, 1901 (31 Stat. 895), which were construed in *Penn Dairies*. See Senate Report No. 571, dated July 10, 1947, in the 80th Cong., 2d Sess., the pertinent provisions of which are reproduced in U. S. Code, Cong. Ser. (80th Cong.—2d Sess.—1948) at pp. 1048, last par., 1053, last par., Hearings before House Committee on Armed

that case, this Court disposed of the appellants' contention as to statutory construction in the following terms:[54]

> To establish such a conflict the government places its reliance on Acts of Congress requiring competitive bidding in the purchase of supplies for the Army. Section 3709 of the Revised Statutes, 41 U. S. C. A. 5, requires public advertising for all government purchases save "when immediate delivery or performance is required by the public exigency." A similar provision had appeared in § 5 of the Act of March 3, 1809, 2 Stat. 535, 536, c. 28, which required all purchases by the Treasury, War or Navy Departments to be made "by open purchase or by previously advertising for proposals respecting the same." The Appropriation Act of March 2, 1901, 31 Stats. 895, 905, c. 803, and subsequent appropriation acts, included a provision requiring public advertising for the purchase of all supplies for the use of the Army, with exceptions not now material, "except in case of emergency or where it is impracticable to secure competition" and requiring the purchase of such supplies "where the same can be purchased the cheapest, the quality and cost of transportation and the interests of the Government considered." 10 U. S. C. A., § 1201. And a provision enacted as part of the Appropriation Act of July 5, 1884, 23 Stats. 106, 109, c. 217, 10 U. S. C. A., § 1200, requires that all purchases of quartermaster's supplies be made by contract after public notice and that the award be made to "the lowest responsible bidder for the best and most suitable article, the right being reserved to reject any and all bids."

Services on H. R. 1306, 80th Cong., 1st Sess., Vol. I, p. 25. Statutes construed in *Penn Dairies* are set forth in Appendix A infra, p. 1.

[54] 318 U. S. 271, last par., 87 L. ed. 754, 1st col., last par.

It is to be noted that while these statutes direct government officials to invite competitive bidding by contractors undertaking to furnish Army supplies, and also require them to accept the lowest responsible bid if any is accepted, they do not purport to set aside local price regulations or to prohibit the states from taking punitive measures for violations of such regulations. They are wholly consistent with the continued existence of such price regulations, and with the acceptance by government officers of the regulated price where that is the lowest bid, or the omission of competitive bidding in circumstances where local price regulations render it "impracticable to secure competition." Nor are we able to discern, in the language or legislative history of these or related statutes regulating government contracts, any indication that low cost was such a controlling consideration with Congress as to justify an inference that Congress intended to displace state regulations affecting the price of articles purchased by the government. The reason for the passage of § 5 of the Act of March 3, 1809, has been said to be "to throw additional safeguards around this subject; to prevent favoritism, and to give to the United States the benefit of competition." 2 Ops. Atty. Gen. 257, 259.

We are not advised of any statute in which Congress has undertaken to set aside state laws affecting the price of goods supplied to the government in order to secure a lower price than would otherwise be obtainable. And Congress has often required the inclusion in government contracts of terms not directly related to the interests of the government as purchaser, which have the effect of increasing cost. Title III, § 2 of the Act of March 3, 1933, 47 Stats. 1489, 1520, c. 212, 41 U. S. C. A., §§ 10(a)-10(c), requires the use of American-produced goods on all public

works contracts unless the head of the department finds that the use of such materials is "impracticable" or would "unreasonably increase the cost." The Eight Hour Law of August 1, 1892, 27 Stat. 340, c. 352, as amended, 40 U. S. C. A., §§ 321-326, limits to eight hours per day the work of persons employed by contractors with the government and requires all government contracts to include provisions to that effect. The Davis-Bacon Act of March 3, 1931, 46 Stat. 1494, c. 411, as amended, 40 U. S. C. A., § 276a, requires all contracts for public buildings to contain prevailing minimum wage provisions, and the Walsh-Healy Act [June 30, 1936], 49 Stat. 2036, c. 881, 41 U. S. C. A., § 35, requires the inclusion in all government contracts in excess of $10,000 of provisions requiring the contractor's adherence to prescribed minimum wages, maximum hours, restrictions on employment of child labor and requirements for safety of working conditions.

Evidence is wanting that Congress, in authorizing competitive bidding, has been so concerned with securing the lowest possible price for articles furnished to the government that it wished to set aside all local regulations affecting price. On the contrary, Congress has regarded the field of public contracts as one over which to exercise its supervisory legislative powers in safeguarding interests which may conflict with the needs of the government viewed solely as purchaser. An inexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication. *United States v. Borden*, 308 U. S. 188, 198, 199, 84 L. ed. 181, 190, 191, 60 S. Ct. 182; *United States v.*

Jackson, 302 U. S. 628, 631, 82 L. ed. 488, 491, 58 S. Ct. 390; *Posadas v. National City Bank*, 296 U. S. 497, 503-505, 80 L. ed. 351, 355, 356, 56 S. Ct. 349, should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation.

Hence, in the absence of some evidence of an inflexible Congressional policy requiring government contracts to be awarded on the lowest bid despite noncompliance with state regulations otherwise applicable, we cannot say that the Pennsylvania milk regulation conflicts with Congressional legislation or policy and must be set aside merely because it increases the price of milk to the government. It would be no more than speculation for us to say that Congress would consider the government's pecuniary interest as a purchaser of milk more important than the interest asserted by Pennsylvania in the stabilization of her milk supply through control of price. Courts should guard against resolving these competing considerations of policy by imputing to Congress a decision which quite clearly it has not undertaken to make. Furthermore we should be slow to strike down legislation which the state concededly had power to enact, because of its asserted burden on the federal government. For, the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden.

Obviously, this construction placed upon the earlier procurement statutes sharply collides with that espoused by the Appellant for the present statutes. From its rendition, *Penn Dairies* has stood as a towering landmark in the field of federal procurement, and in its shadow the Congress has continued to enact procurement statutes preserving substantially the same language construed therein

without any immunization against state price regulation. It is a well-recognized canon of construction that where statutory provisions which have been construed by a court of last resort have been reenacted in the same, or substantially the same, language, the legislature is presumed to have been familiar with their construction, and to have adopted it as a part of the law, unless a contrary intent clearly appears or a different construction is expressly provided for. The rule also applies in the construction of a statute enacted after a similar or cognate statute has been judicially construed.[55]

In conjunction with the above extract from *Penn Dairies*, we should note that the Congress has continued in force the Buy-American Act,[56] providing for a preference in the use of American produced goods on all public works contracts, the Eight Hour Law,[57] the Davis-Bacon Act,[58] and the Walsh-Healey Act,[59] which fix salutary standards governing the employment of labor on public contracts.

We should note that a provision of the Federal Property and Administrative Services Act of 1949,[60] relied on by the Appellant, provides in part as follows:

> (a) The Administrator shall, in respect of executive agencies, and to the extent that he determines that so doing is advantageous to the Government in terms of

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[55] *United States v. Dixon* (1954), 347 U. S. 381, 384, 2d par., 98 L. ed. 785, 1. col., 2d par., 74 S. Ct. 966; *Shapiro v. United States* (1948), 335 U. S. 1, 16, 2d par., 92 L. ed. 1787, 1798, 1. col. 3d par., 68 S. Ct. 1375, reh. den. 335 U. S. 836, 93 L. ed. 388, 69 S. Ct. 9; 82 C. J. S., Statutes, Sec. 370 (b) (1), p. 848

[56] 47 Stat. 1489, 1520, 41 U. S. C. A., Secs. 10a-10d

[57] 27 Stat. 340, 40 U. S. C. A., Secs. 321-326

[58] 46 Stat. 1494, 40 U. S. C. A., Secs. 276a-c

[59] 49 Stat. 2036, 41 U. S. C. A., Secs. 35-45

[60] 63 Stat. 384, Sec. 201 (a) (4), 40 U. S. C., Sec. 481

economy, efficiency, or service, and with due regard to the program activities of the agencies concerned— . . .

(4) *with respect to transportation and other public utility services for the use of executive agencies, represent such agencies in negotiations with carriers and other public utilities and in proceedings involving carriers or other public utilities before Federal and State regulatory bodies;* Provided, That the Secretary of Defense may from time to time, and unless the President shall otherwise direct, exempt the Department of Defense from action taken or which may be taken by the Administrator under clauses (1)-(4) of this subsection whenever he determines such exemption to be in the best interests of national security. (Emphasis supplied.)

Obviously, this provision demonstrates the congressional intent not to immunize the Federal Government from state price fixing in its procurement activities, because otherwise there would be no need for the Administrator to represent executive agencies in proceedings before state regulatory bodies. We should also note that the only exemption provided by the Congress is in the case of the Department of Defense when the interests of national security are involved.

Another provision of the Federal Property and Administrative Services Act of 1949 provides that "It is the declared policy of the Congress that a fair proportion of the total purchases and contracts for supplies and services for the Government shall be placed with small business concerns."[61] A virtually identical provision is contained in the Act of 1956 revising certain Armed Services Procurement provisions.[62] These provisions demonstrate a con-

[61] 63 Stat. 393, Sec. 302 (b), 41 U. S. C., Sec. 252 (b).

[62] 70A Stat. 127, 10 U. S. C., Sec. 2301.

gressional intent to subjugate the Federal Government's interest in the lowest cost procurement of supplies and services to the higher interest in stabilizing and stimulating the national economy.

The next provisions of the 1949 Act[63] we should consider provide as follows:

> (g) The Administrator, in formulating policies with respect to the disposal of surplus agricultural commodities, surplus foods processed from agricultural commodities, and surplus cotton or woolen goods, shall consult with the Secretary of Agriculture. Such policies shall be so formulated as to prevent surplus agricultural commodities, or surplus food processed from agricultural commodities, from being dumped on the market in a disorderly manner and disrupting the market prices for agricultural commodities.
>
> (h) Whenever the Secretary of Agriculture determines such action to be required to assist him in carrying out his responsibilities with respect to price support or stabilization, the Administrator shall transfer without charge to the Department of Agriculture any surplus agricultural commodities, foods, or cotton or woolen goods to be disposed of. Receipts resulting from disposal by the Department of Agriculture under this subsection shall be deposited pursuant to any authority available to the Secretary of Agriculture, except that net proceeds of any sale of surplus property so transferred shall be credited pursuant to section 204 (b), when applicable. Surplus farm commodities so transferred shall not be sold, other than for export, in quantities in excess of, or at prices less than, those applicable with respect to sales of such commodities by the Commodity Credit Corporation.

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[63] 63 Stat. 377 at p. 386, Sec. 203 (g) (h), 40 U. S. C. A. Sec. 484 (g) (h).

Again we find a clear indication of congressional intent that price support regulation shall not be disrupted by the disposal of surplus agricultural commodities.

Also, we should consider the following provision of the 1949 Act,[84] which provides as follows:

> "(d) Nothing in this Act shall impair or affect any authority of— . . .
>
> (2) any executive agency with respect to any phase (including, but not limited to, procurement, storage, transportation, processing, and disposal) of any program conducted for purposes of resale, price support, grants to farmers, stabilization, transfer to foreign governments or foreign aid, relief, or rehabilitation: Provided, That the agency carrying out such program shall, to the maximum extent practicable, consistent with the fulfillment of the purposes of the program and the effective and efficient conduct of its business, coordinate its operations with the requirements of this Act and the policies and regulations prescribed pursuant thereto. . . ."

This provision is significant because it unequivocally reflects the congressional intent that the 1949 Act shall not "impair or affect" any price support or stabilization program administered by any executive agency.

In an effort to thwart the obvious design of the above provisions, the Appellant places great reliance upon various administrative regulations. An examination of these regulations reveals that they are inconclusive as to the interpretation asserted by the Appellant. However, even if we assume *arguendo* the accuracy of such interpretation, we find thereupon a definite conflict between it and the congressional policy reflected by the above statutory provi-

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[84] 63 Stat. 377, at p. 401, Sec. 502 (d) (2).

sions requiring that federal procurement be accommodated to state price regulation. It is well established that administrative regulations which exceed statutory delegations of authority are invalid.[65]

The above provisions of the Federal Property and Administrative Services Act of 1949 and the other federal procurement statutes reflect a congressional policy of procurement consistent with the rationale of *Penn Dairies*. This congressional policy requiring the accommodation of federal procurement to governmental price support and stabilization regulation is predicated upon a realistic recognition of the needs of the national economy. In sharp contrast to this policy, is the myopic economic approach asserted by the Appellant and originated by federal agencies more concerned with stretching their appropriations than with preserving and expanding the national economy. The destructiveness of this approach is exemplified by the admission of the Appellant that its contentions sometimes result in "untoward social and economic consequences" and that, consequently, the district court's decision in *Paul v. United States* (No. 19, this Term), immunizing the United States from the affect of a state law fixing milk prices, has been nullified by executive action.[66] In short, the Appellant's contention as to the immunization of federal procurement from governmental price regulation and, hence, the stimulation of destructive cut-throat competition, is "penny-wise and pound foolish."

Recently, the President of the United States commented that "An efficient and dynamic transportation system is

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[65] *Manhattan General Equipment Co. v. Commissioner of Internal Revenue* (1936), 297 U. S. 129, 80 L. ed. 528; *Waite v. Macy* (1918), 246 U. S. 606, 62 L. ed. 892; *United States v. United Verde Copper Co.* (1905), 196 U. S. 207, 49 L. ed. 449; *Merrill v. Jones* (1883), 106 U. S. 466, 27 L. ed. 267.

[66] Appellant's Brief, p. 67, last par.

vital to our domestic economic growth, productivity and progress."[67] He further stated that the achievement of such a system "means that, to the extent possible, the users of transportation services should bear the full costs of the services they use, whether those services are provided privately or publicly."[68] Surely such a system cannot be achieved if the Federal Government fails to pay its fair share for the services it utilizes.

Manifestly, the Congress in enacting these procurement statutes did not intend the obtainment of unregulated rates, but the accommodation of the method of arranging rates to the existing state regulatory framework. Had its purpose been merely to insure low rates, it could easily have declared that competitive bidding and negotiation for government contracts should be unaffected by state regulation.[69] The congressional intent is conclusive against the Appellant's contentions.

III.

Analysis of Penn Dairies and Kindred Decisions Reveals That the Imposition by a State of an Indiscriminate and Incidental Burden Upon the United States Does Not Contravene Its Implied Immunity.

In *Penn Dairies*, this Court was confronted with the following facts. The State of Pennsylvania established the Pennsylvania Milk Control Commission with authority to fix minimum wholesale and retail prices for milk sold

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[67] President's Message on Transportation, dated April 4, 1962, infra, App. C, at p. iv.

[68] Id., p. viii, 2d par.

[69] See *Carson v. Roane-Anderson Co.* (1952), 342 U. S. 232, 96 L. ed. 257, 72 S. Ct. 257, holding that state sales and use taxes imposed upon contractors with the Atomic Energy Commission were prohibited by a provision of the Atomic Energy Act exempting the Commission from state taxation. It is interesting to note that this decision has been nullified by congressional action. See 67 Stat. 575, 42 U. S. C. A. Sec. 2208.

within the State wherever produced. The Federal Government established a military encampment within the State on land leased from the State and subject to its jurisdiction. The Army invited bids for a supply of milk. The Commission sent a notice to all milk dealers interested in submitting bids, including the appellant, of the minimum wholesale prices to be charged. The appellant submitted a bid at prices below the prescribed minima. The bid was accepted and the contract performed. Subsequently, the Commission issued a citation to the appellant to show cause why its application for a renewal of its license should not be denied because of its violation of the Commission's minimum price order. After a hearing, the license application was denied. In an appeal to the Court of Common Pleas, the Federal Government was granted leave to intervene, and it continued as a party in all subsequent proceedings in the case.[70] The Commission's order was sustained by the Superior Court and Supreme Court of Pennsylvania. On appeal, this Court held that the judgment be affirmed because the Commission had such authority under the police power of the State and the exercise thereof did not place an unconstitutional burden on the Federal Government or interfere with its policy of competitive bidding.[71] The federal procurement statutes and regulations construed by this Court in *Penn Dairies* are analogous to those referred to in Appendix B of Appellant's Brief.

The ratio decidendi of the majority opinion in *Penn Dairies* is tailor-made for the facts in this case as is evidenced by the following excerpt:

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[70] [illegible] 318 U. S. 266, 1 par. 87 L. ed. 752, 1 col. 20 [illegible]

[71] See also: *Rohrer v. Milk Control Board* (1936), 322 Pa. 257, 186 A. 336; *Milk Control Board v. Gosselin's Dairy* (1938), 301 Mass. 174, 16 N. E. 2d 641; *Paterson Milk & Cream Co. v. Milk Control Board* (1937), 118 N. J. L. 383, 192 A. 838.

Appellants,[72] first proposition proceeds on the assumption that local price regulations normally controlling milk dealers who carry on their business within the state, when applied to sales made to the government, so burden it or so conflict with the Constitution as to render the regulations unlawful. We may assume that Congress, in aid of its granted power to raise and support armies, Article 1, § 8, cl. 12, and with the support of the supremacy clause, Article 6, § 2, could declare state regulations like the present inapplicable to sales to the government. Cf. *Pittman v. Home Owners' Loan Corp.*, 308 U. S. 21, 33, 84 L. ed. 11, 17, 60 S. Ct. 15, 124 A. L. R. 1263; *Federal Land Bank v. Bismarck Lumber Co.*, 314 U. S. 95, 101-104, 86 L. ed. 65, 70-72, 62 S. Ct. 1; *Parker v. Brown*, No. 46, January 4, 1943 (317 U. S. 341, ante, 315, 63 S. Ct. 307), and cases cited. But there is no clause of the Constitution which purports, unaided by congressional enactment, to prohibit such regulations, and the question with which we are now concerned is whether such a prohibition is to be implied from the relationship of the two governments established by the Constitution.

We may assume also that, in the absence of congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by federal officers and agencies, of governmental functions. *Ohio v. Thomas*, 173 U. S. 276, 43 L. ed. 699, 19 S. Ct. 453; *Johnson v. Maryland*, 254 U. S. 51, 65 L. ed. 126, 41 S. Ct. 16; *Hunt v. United States*, 278 U. S. 96, 73 L. ed. 200, 49 S. Ct. 38; *Arizona v. California*, 283 U. S. 423, 75 L. ed. 1154, 51 S. Ct. 522. But those who contract to furnish supplies or render services to the government are not such agencies and do

[72] Id., 318 U. S. 268, last par., 87 L. ed. 753, 1. col., 3d par.

not perform governmental functions, *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 524, 525, 70 L. ed. 384, 392, 393, 46 S. Ct. 172; *James v. Dravo Contracting Co.*, 302 U. S. 134, 149, 82 L. ed. 155, 166, 58 S. Ct. 208, 114 A. L. R. 318; *Buckstaff Bath House Co. v. McKinley*, 308 U. S. 359, 362, 363, 84 L. ed. 322, 324, 325, 60 S. Ct. 279, and cases cited; cf. *Susquehanna Power Co. v. State Tax Commission*, 283 U. S. 291, 294, 75 L. ed. 1042, 1045, 51 S. Ct. 434; *Helvering v. Mountain Producers Corp.*, 303 U. S. 376, 385, 386, 82 L. ed. 907, 913, 914, 58 S. Ct. 623, and the mere fact that non-discriminatory taxation or regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within any implied immunity of the government for state taxation or regulation. *Alabama v. King & Boozer*, 314 U. S. 1, 9, 86 L. ed. 3, 6, 62 S. Ct. 43, 140 A. L. R. 615, and cases cited; *Baltimore & A. R. Co. v. Lichtenberg*, 176 Md. 383, 4 A. (2d) 734, s. c.; *United States v. Baltimore & A. R. Co.*, 308 U. S. 525, 84 L. ed. 444, 60 S. Ct. 297.

Here the state regulation imposes no prohibition on the national government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty. See the opinion below, 148 Pa. Super. Ct. 270, 271, 24 A. (2d) 717. As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk. By the exercise of control over the seller, the regulation imposes or may impose an increased economic burden on the government, for it may be assumed that the regulation if enforcible and enforced will increase the price of the milk purchased for consumption in Pennsylvania, unless the government is able to procure a supply from without the state, see *Baldwin v.*

G. A. F. Seelig, Inc., 294 U. S. 511, 79 L. ed. 1032, 55 S. Ct. 497, 101 A. L. R. 55. But in this burden, if Congress has not acted to forbid it, we can find no different or greater impairment of federal authority than in the tax on sales to a government contractor sustained in *Alabama v. King & Boozer*, 314 U. S. 1, 86 L. ed. 3, 62 S. Ct. 43, 140 A. L. R. 615, supra; or the state regulation of the operations of a trucking company in performing its contract with the government to transport workers employed on a Public Works Administration project, upheld in *Baltimore & A. R. Co. v. Lichtenberg*, 176 Md. 383, 4 A. (2d) 734, supra; or the local building regulations applied to a contractor engaged in constructing a post-office building for the government, sustained in *James Stewart & Co. v. Sadrakula*, 309 U. S. 94, 84 L. ed. 596, 60 S. Ct. 431, 127 A. L. R. 821.

The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in co-ordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders. See *Metcalf & Eddy v. Mitchell*, supra (269 U. S. 523, 524, 70 L. ed. 392, 393, 46 S. Ct. 172). And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to

be implied from the Constitution which established the system. See *Graves v. New York*, 306 U. S. 466, 483, 487, 83 L. ed. 927, 934, 937, 59 S. Ct. 595, 120 A. L. R. 1466.

Since the Constitution has left Congress free to set aside local taxation and regulation of government contractors which burden the national government, we see no basis for implying from the Constitution alone a restriction upon such regulations which Congress has not seen fit to impose, unless the regulations are shown to be inconsistent with Congressional policy. Even in the case of agencies created or appointed to do the government's work we have been slow to infer an immunity which Congress has not granted and which Congressional policy does not require. *Reconstruction Finance Corp. v. J. G. Menihan Corp.*, 312 U. S. 81, 85 L. ed. 595, 61 S. Ct. 485, and cases cited; *Colorado Nat. Bank v. Bedford*, 310 U. S. 41, 53, 84 L. ed. 1067, 1074, 60 S. Ct. 800, and cases cited; cf. *Baltimore Nat. Bank v. State Tax Commission*, 297 U. S. 209, 80 L. ed. 586, 56 S. Ct. 417. Our inquiry here, therefore, must be whether the state's regulation of this contractor in a matter of local concern conflicts with Congressional legislation or with any discernible Congressional policy.[73]

The rationale of *Penn Dairies* is analogous to that expressed by this Court in numerous other decisions. The tax decisions are particularly helpful in placing in proper perspective the economic burden complained of by the Appellant in this case.

In *Alabama v. King & Boozer*,[74] a contractor erected an army camp for the United States under a cost plus con-

[73] The Court resolved this inquiry against the United States as pointed out in Part II of the Argument, *supra*.

[74] (1941) 314 U. S. 1, 86 L. ed. 3, 62 S. Ct. 43. See also *Curry v. United States* (1941) 314 U. S. 14, 86 L. ed. 9, accord

tract and this Court upheld a state sales tax on the sale of materials which was ultimately paid by the United States. This Court held that Federal Government contractors are not immune from state taxation where the burden imposed is incidental and nondiscriminatory. The Court stated:

> So far as such a nondiscriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see *Panhandle Oil Co. v. Mississippi* and *Graves v. Texas Co.*, *supra*, we think it no longer tenable. See *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 70 L. ed. 384, 46 S. Ct. 172; *Trinityfarm Constr. Co. v. Grosjean*, 291 U. S. 466, 78 L. ed. 918, 54 S. Ct. 469; *James v. Dravo Contracting Co.*, 302 U. S. 134, 160, 82 L. ed. 155, 172, 58 S. Ct. 208, 114 A. L. R. 318; *Helvering v. Gerhardt*, 304 U. S. 405, 416, 82 L. ed. 1427, 1434, 58 S. Ct. 969; *Graves v. New York*, 306 U. S. 466, 83 L. ed. 927, 59 S. Ct. 595, 120 A. L. R. 1466.

In repudiating the majority view expressed in *Panhandle*, this Court in effect adopted the dissents of Justices Holmes, Brandeis, Stone and M Reynolds expressed therein. Justice Holmes dissented as follows:

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panion case to *King & Boozer*, which upheld a state use tax imposed on the use of roofing purchased outside the state by a contractor for the United States on a cost-plus contract and used by it in constructing an army camp within the state.

[75] Id., 314 U. S. 8, last par., 86 L. ed. to lower l. col.

The state of Mississippi in 1924 and 1926 imposed upon distributors and retail dealers of gasoline, for the privilege of engaging in the business, an excise tax of three cents and four cents respectively per gallon sold in the state. The supreme court of the state declares it to be a privilege tax but points out that whether this tax is on the privilege or on the property it is imposed before the gasoline has left the dealer's hands. The plaintiff in error, a dealer, was sued by the state for certain sums that were due under the statutes. It pleaded that the sales in respect of which the tax was demanded were sales to the United States for the use of its Coast Guard and Veterans' Hospital, that these being instrumentalities of the government it did not include the amount of the tax in the price charged, and that the statute did not and could not tax the dealer for them consistently with the Constitution of the United States. The supreme court of the state upheld the tax and pointed out the extreme consequences to which a different decision might lead.

It seems to me that the state court was right. I should say plainly right, but for the effect of certain dicta of Chief Justice Marshall which culminated in or rather were founded upon his often quoted proposition that the power to tax is the power to destroy. In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the states had any power it was assumed that they had all power, and that the necessary alternatives was to deny it altogether. But this court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing

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[76] *Panhandle Oil Co. v. Mississippi* (1927), 277 U. S. 218, 222, par., 72 L. ed. 857, 850, col. 1, par. 48 S. Ct. 451, 56 A. L. R. 583.

the power to tax. The power to tax is not the power to destroy while this court sits. The power to fix rates is the power to destroy if unlimited, but this court while it endeavors to prevent confiscation does not prevent the fixing of rates. A tax is not an unconstitutional regulation in every case where an absolute prohibition of sales would be one. *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 162, 51 L. ed. 415, 423, 27 Sup. Ct. Rep. 188.

To come down more closely to the question before us, when the government comes into a state to purchase I do not perceive why it should be entitled to stand differently from any other purchaser. It avails itself of the machinery furnished by the state and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges that it uses. It has no better or other right to use them than anyone else. The cost of maintaining the state that makes the business possible is just as necessary an element in the cost of production as labor or coal. If the plaintiff in error had paid the tax and had added it to the price the government would have had nothing to say. It could take the gasoline or leave it but it could not require the seller to abate his charge even if it had been arbitrarily increased in the hope of getting more from the government than could be got from the public at large. But in fact the government has not attempted to say anything in this case, which is simply that of a dealer trying to cut down a legitimate tax on his business because certain purchasers proposed to use the goods in a certain way, although so far as the sale was concerned they were free to turn the gasoline into the ocean, use it for private purposes or sell it again. It does not appear that the government would have refused to pay a price that included the tax if de-

manded, but if the government had refused it would not have exonerated the seller. *Pierce Oil Corp. v. Hopkins*, 264 U. S. 137, 139, 68 L. ed. 593, 596, 44 Sup. Ct. Rep. 251.

An imperfect analogy with taxation that affects interstate commerce is relied upon. Even the law on that subject has been liberalized since the decision of most of the cases cited. *Sonneborn Bros. v. Curtiss* (*Sonneborn Bros. v. Keeling*), 262 U. S. 506, 67 L. ed. 1095, 43 Sup. Ct. Rep. 643. But obviously it does not follow from the invalidity of a tax directly burdening interstate commerce that a tax upon a domestic seller is bad because he may be able to shift the burden to a purchaser, even though an agency of the government, who is willing to pay the price with the tax and who has no rational ground for demanding favor. I am not aware that the President, the Members of Congress, the Judiciary or, to come nearer to the case in hand, the Coast Guard or the officials of the Veterans' Hospital, because they are instrumentalities of government and cannot function naked and unfed, hitherto have been held entitled to have their bills for food and clothing cut down so far as their butchers and tailors have been taxed on their sales; and I had not supposed that the butchers and tailors could omit from their tax returns all receipts from the large class of customers to which I have referred. The question of interference with Government, I repeat, is one of reasonableness and degree and it seems to me that the interference in this case is too remote. *Metcalf v. Mitchell*, 269 U. S. 514, 70 L. ed. 384, 46 Sup. Ct. Rep. 172.

In *Graves v. New York ex rel. O'Keefe*[77] this Court held that the imposition of a nondiscriminatory state in-

[77] (1939), 306 U. S. 466, 83 L. ed. 927, 59 S. Ct. 595, 120 A. L. R. 1466.

come tax upon the salary of an employee of a corporate instrumentality of the Federal Government does not place an unconstitutional burden on the Federal Government where the Congress has not conferred on the salaries of the employee of such instrumentality an immunity from state taxation. This Court, speaking through Justice Stone, stated as follows:[78]

> So much of the burden of a nondiscriminatory general tax upon the incomes of employees of a government, state or national, as may be passed on economically to that government, through the effect of the tax on the price level of labor or materials, is but the normal incident of the organization within the same territory of two governments, each possessing the taxing power. The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the Constitution presupposes, and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other. The immunity is not one to be implied from the Constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments.

O'Keefe established the doctrine that the immunity of federal instrumentalities from the indirect affect of state taxation is a matter for the Congress to determine and that the judicial function is limited to the interpretation of the congressional will.

The rationale expressed in *Penn Dairies, King & Boozo* and *O'Keefe* is reflected in the following decisions: *Trinityfarm Construction Co. v. Grosjean* (1934), 291 U. S.

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[78] Id., 306 U. S. 487, 1st par., 83 L. ed. 937, 1 col., 2d par.

466, 78 L. ed. 918, 54 S. Ct. 469 (Held that no unconstitutional taxation of means or instrumentalities of Federal Government is involved in the imposition of a state excise tax on gasoline consumed by a contractor with the United States in the performance of a contract for the construction of levees); *James v. Dravo Contracting Co.* (1937), 302 U. S. 134, 160, 82 L. ed. 155, 172, 58 S. Ct. 208, 114 A. L. R. 318 (Held that an occupation tax measured by gross income is not invalid where imposed by a state upon a contractor with the United States as laying a direct burden on the Federal Government, even though the imposition of the tax may increase the cost to the Government of the work contracted to be done); *E. E. Morgan Co. v. Arkansas for use of Phillips County* (1941), 202 Ark. 404, 150 S. W. 2d 736, app. disp. (1941), 314 U. S. 571, 86 L. ed. 463, 62 S. Ct. 77, reh. den. (1941), 314 U. S. 711, 86 L. ed. 567, 62 S. Ct. 175 (Held that a foreign corporation engaged in construction of a levee in Arkansas under federal contract negotiated outside the state was not exempt from compliance with statutory requirements for doing business in the State of Arkansas); *State v. Wiles* (1921), 116 Wash. 387, 199 P. 749, 18 A. L. R. 1163 (Held that a contractor carrying mail for the United States was required to purchase state licenses for his trucks); *Wilson v. Cook* (1946), 327 U. S. 474, 90 L. ed. 793 (Upheld state severance tax imposed upon a contractor with the United States who purchases and cuts timber from federally owned land); *Rainier National Park Co. v. Hennaford* (1935), 182 Wash. 159, 45 P. 2d 617, cert. den. (1935), 296 U. S. 647, 80 L. ed. 460, 56 S. Ct. 307 (Held that a private corporation which had a contract with the United States for the operation of concessions in a national park was subject to state taxation); *Alward v. Johnson* (1931), 282 U. S. 509, 75 L. ed. 496 (Held that one having a contract to carry the mails is not immune as an agency of the Federal Government from state taxation of property used

in the performance of such contract, even though the tax is based upon the gross receipts from his contract with the government); *Reconstruction Finance Corp. v. Menihan Corp.* (1941), 312 U. S. 81, 85 L. ed. 595 (Held that in conferring upon the RFC power to sue and to be sued, and in failing to endow it with the Federal Government's immunity from liability for costs, Congress has indicated an intention to subject it to the liability of an unsuccessful litigant to costs and to the additional allowance made by courts of equity in accordance with equity practice); *Colorado National Bank of Denver v. Bedford* (1940), 310 U. S. 41, 84 L. ed. 1067 (Held that a state statute requiring a national banking corporation to collect and remit to the state the amount of a tax imposed upon the value of safe deposit box services rendered to its customers and allowing the bank a portion of the tax as compensation for the burden of collection, being a tax on customers and not upon the bank, does not impose an unconstitutional burden on a federal instrumentality); *Trotter v. Tennessee* (1933), 290 U. S. 354, 78 L. ed. 358 (Held that the exemption from taxation of compensation paid by the United States to its disabled veterans and of disability benefits under a policy of war risk insurance, conferred by federal statute, is lost when the money is converted into land and buildings); *James Stewart & Co. v. Sadrakula* (1940), 309 U. S. 94, 84 L. ed. 596 (Held that the provisions of a state labor law requiring contractors constructing buildings to board over all open steel tiers for the protection of their employees continue operative in territory over which the United States has acquired exclusive jurisdiction, and are applicable to a contractor constructing a post office therein); *Susquehanna Power Co. v. State Tax Commission of Maryland* (1931), 283 U. S. 291, 75 L. ed. 1042 (Held that lands acquired by a licensee of the FPC for the construction of a dam in a navigable river, and used as a part of its licensed power project, are not within

the immunity from state taxation enjoyed by instrumentalities of the Federal Government); *Esso Standard Oil v. Evans* (1953), 345 U. S. 495, 97 L. ed. 1174, 73 S. Ct. 800 (Held that the constitutional doctrine of implied intergovernmental immunity does not invalidate a state privilege tax on the business of storing gasoline, measured by the quantity of gasoline stored, as applied to a contractor with the United States who stores gasoline owned by the Federal Government); and *Werner Machine Company, Inc. v. Director of Taxation* (1956); 350 U. S. 492, 100 L. ed. 634, 76 S. Ct. 534 (Sustained a state "annual franchise tax on corporations measured by net worth," which was construed as including federal bonds). See also: *Railway Mail Association v. Corsi* (1945), 326 U. S. 88, 89 L. ed 2072; *Buckstaff Bath House Co. v. McKinley* (1939), 308 U. S. 358, 84 L. ed 322; *Helvering v. Mountain Producers Corp.* (1938), 303 U. S. 376, 82 L. ed. 907; *Metcalf v. Mitchell* (1926), 269 U. S. 514, 70 L. ed 384; *Commonwealth v. Closson* (1918), 229 Mass. 329, 118 N. E. 653, L. R. A. 1918C 929; *Railroad Co. v. Lichtenberg* (1939), 176 Md. 383, 4 A. 2d 734, app. dism. (1939), 308 U. S. 525, 84 L. ed. 444, 60 S. Ct. 297.

The tax decisions considered above imposed an enormous economic burden upon the United States. However, in each case the burden was upheld because its imposition was indiscriminate and incidental, and, hence, did not contravene the implied immunity of the United States.

Furthermore, we should note that these tax decisions provide powerful analogies for supporting the state rate regulation attacked in this case. In the tax cases the economic burden imposed upon the United States was directly transformed into an asset in the state treasury thereby benefiting primarily the state. However, under the facts of this case the burden imposed upon the United States, by its paying its fair share for the transportation

services it procures, acts to stimulate and stabilize the intrastate transportation system in Georgia, which redounds to the mutual benefit of both governments. Consequently, the rationale of the tax decisions should apply with even greater force in cases of this nature.

The Appellant attempts to distinguish some of these tax decisions by contending that when the tax is levied upon a private contractor doing business with the United States the "incidence of the resulting economic burden is problematical."[79] This approach is unrealistic. From an economic standpoint, it makes no difference whether the tax is imposed on the contractor or his employer, provided it is known in advance that the demand is certain. In making appraisals contractors include in the bid the estimated tax along with the cost of labor and supplies. The crucial point involved in these cases is the legal incidence of the tax, not the economic incidence.

These decisions reveal unequivocally that private contractors who merely have business or other relations with the United States are susceptible to state regulation, irrespective of the fact that an indirect, indiscriminate and incidental burden may be transmitted through them to the United States.

IV.

Analysis of *Public Utilities* and Kindred Decisions Reveals That State Action Interfering With the Exercise of a Federal Function Contravenes the Implied Immunity of the Federal Government.

In *Public Utilities*,[80] this Court held invalid, under the Supremacy Clause of the Federal Constitution, a Cali-

[79] Appellant's Brief, p. 64, last par.

[80] *Public Utilities Commission of the State of California v. United States* (1958), 355 U. S. 534, 2 L. ed. 2d 470, 78 S. Ct. 446, reh. den. 356 U. S. 925, 2 L. ed. 2d 760, 78 S. Ct. 713

fornia statute prohibiting carriers from transporting property owned by the United States at rates other than those approved by the California Public Utilities Commission on the grounds that such statute interfered with the United States in performing its function of providing for the national defense.

In order to obtain the full impact of *Public Utilities*, we will begin this analysis by reviewing the relevant aspects of the opinion and judgment of the Three-Judge District Court[81] which was affirmed by this Court.

The District Court began its opinion with the following statement:

> "To[82] git thar fustest with the mostest men" was the recipe for victory announced by General Nathan Bedford Forrest, the Confederate cavalry leader.
>
> There is as much military wisdom in that dictum today as there was a century ago. In this atomic age, speed in the movement of men and supplies is still necessary.
>
> In the instant case, the theory of the plaintiff, as expressed in its complaint, is that if Section 530 of the Public Utilities Code of California, as amended in 1955, infra, hereinafter referred to as "Sec. 530", is held to apply to shipments made by the plaintiff, "it would greatly impede the discharge by the United States of its constitutional powers and responsibilities by inevitably causing delays in such shipments when time is of the essence and in many situations would expose to the public patterns of movement and traffic which would be subject to interpretation by the in-

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[81] *United States v. Public Utilities Commission of the State of California* (D. C.—N. D. Cal.—1956), 141 F. Supp. 168.

[82] Id., 141 F. Supp. 170, r. col.

telligence agents of foreign powers and might jeopardize the security of the United States."

The District Court reported Section 530 to read as follows:

> "Every[53] common carrier * * * may transport, free or at reduced rates: (a) *Persons* for the United States, state, county, or municipal governments, or persons or property for charitable or patriotic purposes * * *. The commission may permit common carriers to transport property at reduced rates for the United States, state, county or municipal governments, *to such extent and subject to such conditions as it may consider just and reasonable*. Nothing herein shall prevent any common carrier subject to the provisions of this part from transporting property for the United States, state, county, or municipal governments, at reduced rates *no lower than rates which lawfully may be assessed and charged by any other such common carrier or by highway permit carriers* * * *" (California Stat., 1955, c. 1966). (Emphasis supplied).

The District Court questioned Section 530 in the following terms:

> May[54] a State statute *empower* a State Commission, however patriotic and well intentioned that Commission may be, to "permit common carriers to transport property at reduced rates for the United States, state, county or municipal governments, *to such extent and* SUBJECT *to such conditions as* IT *may consider just and reasonable*"? (Emphasis supplied)

and answered the question in the negative.

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[53] Id., 141 F. Supp. 174, 1 col.

[54] Id., 141 F. Supp. 171, 1 col., last par.

After giving a statement of the case and the pleadings therein, the District Court summarized the testimony.[58]

The principal witness of the United States was Brigadier General Lasher, who represented the Department of Defense.[59]

General Lasher explained the relationship between commodity and class rates as follows:

"Well," it's the law that carriers must—we will take the railroads—must be able to quote a rate to a prospective customer on any item from any point in the United States to any other point in the United States. It was apparently impossible to price each and every item of commerce. So these items of commerce were placed in about a dozen classes. However, it is quite obvious that there would be no movement of oranges from Maine to Florida, yet there is an applicable rate in these class rates.

"As commerce grew, industry spread out, it was necessary to afford industry a cost of movement more nearly geared to the requirements of that movement, so that the goods upon arrival at destination were not too costly for the consumer, and a system of commodity rates in lieu of class rates grew up.

"The commodity rate is a rate from a point of manufacture, let's say, to a point of distribution or consumption, which is based upon a volume move, based upon the facility of the manufacturer to get his goods to market, allowing him as much in the way of profit as possible and the carrier, too. So we find that commodity rates generally move commerce in the United States today. Class rates do not. As a matter

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[58] Id., 141 F. Supp. 174 1 col. last par.

[59] Id., 141 F. Supp. 175, lower ½ col.

of fact, they are popularly referred to as paper rates, rates which are on the books to satisfy the law."

General Lasher then described a war experience in Korea which illustrated the importance of logistics.[87] He concluded this description by stating that:

> "Nothing" must be placed as an impediment to the complete flexibility and flow of movement of supplies to our troops in foreign theaters, whether it's in peace or in war."

In reply to a question regarding the effect that state regulation of rates for intrastate shipments of the Federal government's material "would have on the supply lines and logistical system of the United States,"[88] the General said:

> "Now,[89] then, for us to make these arrangements at the Washington level with the various states, let us say 48 states, with 48 varieties of methods to follow, we would find ourselves in an administrative *morass* out of which we would never fight our way, *we would never win the war!* Our negotiations for these arrangements, and I don't say just rates, but our negotiations for arrangements for the movement of traffic must be flexible; they must be direct with the parties in interest, *and they must be as secure as possible*.
>
> "We haven't touched on the security yet, but security is of primary importance to us * * *. Were we to spread * * * the record of the characteristics of our freight before the public and the parties at in-

[87] Id., 141 F. Supp. 175, r. col., 3d par.

[88] Id., 141 F. Supp. 176, l. col., 2d par.

[89] Id., 141 F. Supp. 176, l. col., 3d par.

[90] Id., 141 F. Supp. 176, r. col., 1st par.

terest, we would seriously jeopardize that security, and in some cases be in violation of the law.

"There are many items which move today which are not described, some items which are willfully misdescribed in order to hide their identity, and they are moving in quantity. The only people who know what they are are about four. The carrier, whether he be a highway carrier or rail, usually doesn't know what he is carrying; but he has been told by one of his officials that that is what he will carry and the billing will be such and such and the security of that item is thereby maintained.

"Were we to have to go through a regulatory body, we would never be able to accomplish this."

The General added that state regulation of rates would tend to increase the freight bill of the Federal Government:

"Getting back to these class and commodity rates again, the procedure would be so cumbersome and so time-consuming that we would, in desperation, ship on the class-rate structure rather than wait for the procedures to be consummated and thereby increase considerably our transportation cost."

The District Court then related the testimony of another witness for the United States, Lieutenant Colonel Hall, who testified as to the complexity of having to segregate a large number of diverse items and rate each separately for shipment in intrastate commerce.[91] Colonel Hall then testified as to the security aspects of military shipments as follows:

On[92] the subject of required secrecy in certain cases Colonel Hall stated that "really over a period of time

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[91] Id., 141 F. Supp. 178, 1 col., 2d par.

[92] Id., 141 F. Supp. 179, lower 1 col.

every military shipment is in a sense a security shipment."

"I had some experience in Europe in that situation," the Lieutenant Colonel explained. "A trained intelligence worker, espionage worker, can develop an amazing amount of accurate information just through looking at the records, say, for a month's time on our very prosaic shipments . . . shoes, medical supplies and food. Actually, a month's record of shipments to an installation will indicate how many troops are there, the status of training of the troops, the status of their health and their overall motion as well as their ultimate destination."

Colonel Hall added that he did not think it would be possible to reveal the necessary data for logical and reasonable rate approval purpose in connection with many of the shipments that are secret in nature.

"If everything is to be made public, we might as well publish it in the newspapers," he declared.

Lieutenant Colonel Elanegan of the United States Army, another witness for the United States, emphasized the security aspect of military movements[93] and the unreasonable cost of class rates in comparison with commodity rates.[94]

Lieutenant Commander Bengtson of the United States Navy testified that delays caused by state regulation might be crucial for operational purposes in the Navy[95] and that such regulation would be detrimental to Navy security requirements.[96]

Colonel Chambers of the United States Air Force testified as follows:

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[93] Id., 141 F. Supp. 179, lower r. col.

[94] Id., 141 F. Supp. 180, l. col., 2d par.

[95] Id., 141 F. Supp. 180, r. col., 2d par.

[96] Id., 141 F. Supp. 181, l. col., 2d par.

"I[97] say 'definitely,'" he explained, "because we—our logistics system is based on *speed* and we can not tolerate anything that would interfere with speed. And, as I have pointed out previously, this Air Force mission is worldwide, and I think everyone recognizes the importance that Strategic Air Command has played in present world affairs."

Referring to "security type shipments" Colonel Chambers testified that "we wouldn't want to reveal the number of shipments that do develop, nor the numbers (number?) of missiles that are involved or the points of origin and destination. We would certainly not * * * want to do it, and we would conceal that in so far as possible."

Lieutenant Colonel Eastham of the United States Marine Corps testified that the classification for rate purposes of many diverse items for shipment would slow down the movement of freight,[98] increase cost and interfere with secrecy.[99]

The District Court then briefly reviewed the testimony of witnesses appearing on behalf of the Public Utilities Commission and then went into an examination of the merits of the case.

The District Court distinguished *Penn Dairies* as follows:

In[100] the first place, the State regulation imposed "no prohibition on the national government or its officers." They might "purchase milk from whom and at what price they (wished), without incurring

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[97] Id., 141 F. Supp. 181, 1 col., 5th par.

[98] Id., 141 F. Supp. 181, 1 col., 2d par.

[99] Id., 141 F. Supp. 181, 1 col., 4th par.

[100] Id., 141 F. Supp. 180, 1 col., 1st par.

any penalty." Here, however, as we have seen, there are penalties that could be imposed upon any officer of the United States who violates the provisions of the Public Utilities Act. Section 2112 provides:

> "Every person who, either individually, or acting as an officer, agent, or employee of a corporation other than a public utility, violates any provision of this part, or fails to comply with any part of any order, decision, rule, direction, demand, or requirement of the commission, or who procures, aids, or abets any public utility in such violation or non-compliance, in a case in which a penalty has not otherwise been provided for such person, is guilty of a misdemeanor, and is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment."

But over and beyond this, the Penn case did not involve the procurement of the engines of war. There is a constitutional difference between a milk can and a hydrogen bomb!

The District Court concluded by finding that the United States presented evidence in abundance to substantiate its contentions,[101] and held that the United States was entitled to the relief sought by it.[102]

On appeal, this Court recognized that "The seriousness of the impact of California's regulation on the action of federal procurement officials is dramatically shown by this record."[103]

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[101] Id., 141 F. Supp. 190, l. col., last par.

[102] Id., 141 F. Supp. 190, r. col., 2d par.

[103] *Public Utilities Commission v. United States* (1958), 355 U. S. 534, 544; 3d par., 2 L. ed. 2d 470, 478, l. col., 3d par., 78 S. Ct. 446.

In affirming the judgment of the District Court, this Court carefully distinguished *Penn Dairies* and kindred decisions in the following manner:

> We[194] lay to one side these cases which sustain non-discriminatory state taxes on activities of contractors and others who do business for the United States, as their impact at most is to increase the costs of the operation. See, e. g., *Esso Standard Oil Co. v. Evans*, 345 U. S. 495, 97 L. ed. 1174, 73 S. Ct. 800; *Smith v. Davis*, 323 U. S. 111, 89 L. ed. 107, 65 S. Ct. 157; *Alabama v. King & Boozer*, 314 U. S. 1, 86 L. ed. 3, 62 S. Ct. 43, 140 A. L. R. 615; *James v. Dravo Contracting Co.*, 302 U. S. 134, 82 L. ed. 155, 58 S. Ct. 208, 114 A. L. R. 318. We also need do no more than mention cases where, absent a conflicting federal regulation, a State seeks to impose safety or other requirements on a contractor who does business for the United States. See, e. g., *Baltimore & A. R. Co. v. Lichtenberg*, 176 Md. 383, 4 A. 2d 734, app. dism'd 308 U. S. 525, 84 L. ed. 444, 60 S. Ct. 297; *James Stewart & Co. v. Sadrakula*, 309 U. S. 94, 84 L. ed 596, 60 S. Ct. 431, 127 A. L. R. 821; *Penn Dairies v. Milk Control Com.*, 318 U. S. 261, 87 L. ed. 748, 63 S. Ct. 617, can likewise be put to one side. There the question, much mooted, was whether the federal policy conflicted with the state policy fixing the price of milk which the United States purchased. The Court concluded that the state regulation "imposes no prohibition on the national government or its officers." Id. 318 U. S. at 270. Here, however, the State places a prohibition on the Federal Government. Here the conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates seems to us to be clear. The conflict is as plain as it

[194] Id., 355 U. S. 543, 2d par., 2 L. ed. 477, 1. col., last par.

was in *Arizona v. California*, 283 U. S. 423, 451, 75 L. ed. 1154, 1163, 51 S. Ct. 522, where a State sought authority over plans and specifications for a federal dam, in *Leslie Miller, Inc. v. Arkansas*, 352 U. S. 187, 1 L. ed. 2d 231, 77 S. Ct. 257, supra, where state standards regulating contractors conflicted with federal standards for those contractors, and in *Johnson v. Maryland*, 254 U. S. 51, 65 L. ed. 126, 41 S. Ct. 16, where a state sought to exact a license requirement from a federal employee driving a mail truck. The conflict seems to us to be as clear as any that the Supremacy Clause, Art. 6, cl. 2, of the Constitution was designed to resolve.

These distinctions make it abundantly clear that this Court did not intend that *Public Utilities* would eclipse or devitalize the doctrine reflected by *Penn Dairies*. Furthermore, *Public Utilities* plainly did not announce any change in doctrine by this Court because the following three Michigan cases were decided on the same day as *Public Utilities*.

In *United States v. City of Detroit*,[105] this Court held that a state tax assessed against a private corporation engaged in business for profit based upon the value of realty owned by the United States and leased to the corporation under a lease permitting the corporation to deduct from the agreed rental any such taxes paid by it but reserving to the United States the right to contest the validity of such taxes, did not invade the constitutional immunity of federal property from taxation by the states or discriminate against the United States or those with whom it deals. This Court further held that the Federal Government's constitutional immunity does not shield private parties leasing federally owned realty from state taxes imposed on them merely because part or all of the financial

[105] (1958), 355 U. S. 466, 2 L. ed. 2d 424, 78 S. Ct. 474

burden of the taxes eventually falls on the Federal Government. This Court reached a similar conclusion in *United States v. Township of Muskegon*.[106] In *City of Detroit v. Murray Corporation of America*,[107] this Court held that a state tax, based in part on the value of materials and work in process actually in the possession of a subcontractor but legal title to which has passed to the United States, did not infringe the Federal Government's constitutional immunity from state taxation or discriminate against the Federal Government, its property or those with whom it does business. This Court recognized that the Federal Government will eventually feel the financial burden of at least some of such tax, but held that the imposition of an increased financial burden on the Federal Government did not by itself invalidate a state tax.

The ratio decidendi of *Public Utilities* is consistent with that expressed in *McCullough v. Maryland*,[108] *Arizona v. California*,[109] *Johnson v. Maryland*,[110] and other decisions.

In *McCullough v. Maryland*, this Court held that a state could not levy a direct tax upon a banking agency of the United States operating within the state. In *Arizona v. California*, this Court held that the United States may perform its functions such as building a dam to improve navigation without obtaining approval of its plans and specifications as required by state statute. In *Johnson v. Maryland*, this Court held that a state law r[illegible]ir-

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[106] (1958), 355 U. S. 484, 2 L. ed. 2d 436, 78 S. Ct. 483

[107] (1958), 355 U. S. 489, 2 L. ed. 2d 441, 460, 78 S. Ct. 458, 486.

[108] (1819), 4 Wheaton (U. S.) 316, 4 L. ed. 579

[109] (1931), 283 U. S. 423, 75 L. ed. 1154, 51 S. Ct. 522

[110] (1920), 254 U. S. 51, 65 L. ed. 126, 41 S. Ct. 16

ing the operator of a mail truck to obtain a license as a condition to his right to drive it, in effect, to perform his job, was invalid when applied to government servants. In *Leslie Miller, Inc. v. Arkansas*,[111] this Court held invalid, as applied to a federal contractor, a state law requiring contractors to obtain a license from the state. In a per curiam opinion, this Court emphasized that the case came within the rationale of *Johnson v. Maryland*. And, in *Kern-Limerick, Inc. v. Scurlock*,[112] this Court invalidated the application of a state sales tax to a sale in which federal contractors, acting as purchasing agents for the United States, acquired two tractors for use in constructing a naval ammunition depot for the United States under a "cost-plus" contract. The bids and purchase order involved in the sale stated that "This purchase is made by the Government."[113] Consequently, this Court concluded that "Under these circumstances, it is clear that the Government is the disclosed purchaser and that no liability of the purchasing agent to the seller arises from the transaction,"[114] and, on this basis, distinguished the case from *Alabama v. King & Boozer*,[115] supra. In *Mayo v. United States*,[116] this Court held that a state may not, without congressional permission, require the United States to pay an inspection fee for the inspection of fertilizer distributed to farmers by the United States as a part of its soil-building program. In *Public Utilities*, this Court struck down state regulation of the movement of military supplies because such regulation directly inter-

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[111] (1956), 352 U. S. 187, 1 L. ed. 231, 77 S. Ct. 257.

[112] (1954), 347 U. S. 110, 98 L. ed. 546, 74 S. Ct. 403.

[113] Id., 347 U. S. 119, 2d par., 98 L. ed. 555, r. col., 3d par.

[114] Id., 347 U. S. 120, last line, 98 L. ed. 556, l. col., 3d par.

[115] Id., 347 U. S. 122, 2d par., 98 L. ed. 556, r. col., last par.

[116] (1943), 319 U. S. 441, 87 L. ed. 1504.

fered with the performance of the federal function of providing for the national defense.

These decisions reflect the federal-half of the implied intergovernmental immunity doctrine which absolutely immunizes the United States, together with its functions, property and instrumentalities, from any direct burden imposed by a state. However, these decisions do not in any manner immunize, from state regulation, private contractors who merely have business or other relations with the United States, irrespective of the fact that an indirect, indiscriminate and incidental burden may be transmitted through them to the United States.

V.

The Georgia Statutes and Regulations Do Not Unconstitutionally Burden the United States or Its Officers.

In exploring this division of the Brief, we will initially consider the requirements of the rate statutes and regulations and then move on to an evaluation of the scope of the criminal statute.

A.

The Rate Statutes and Regulations Do Not Place An Unconstitutional Burden Upon the United States or Its Officers.

Within the light of the decisions previously analyzed, we turn now to a consideration of the practical effect upon the United States of Georgia's program for regulating private carriers transporting the household goods of federal employees in intrastate commerce.

In attempting to fashion an unconstitutional burden, the Appellant first complains that the Georgia tariff provision requiring that the "Property of two or more families or establishments will not be accepted for transpor-

tation as a single shipment,"[117] unduly impedes the United States' ability to procure mass movements of household goods of its employees.[118]

The tariff in no way impedes mass movements, but merely requires that the rate be computed on an intrastate single shipment basis irrespective of the number of intrastate single shipments combined in a mass movement. Under any arrangement for transporting property for hire, there must be an evaluation of the character and weight of the property to be transported in order to compute the rates therefor, whether they be established by state regulation or arrived at by negotiation or competitive bidding. Consequently, the goods of each federal employee in a mass movement must be so evaluated and, thereupon, it is as easy to apply a state tariff as it is to apply a rate obtained otherwise.

A realistic appraisal of this tariff and the practical requirements of for hire transportation reveals that Georgia's rate regulation imposes no additional administrative burden upon the United States or its officers. If any burden exists, it is economic in nature and is indiscriminately and incidentally imposed, and merely means that the United States is contributing its fair share to properly maintain the service it is using.

It is interesting to note here, that the Appellant in attempting to avoid the stigma of contributing to the economic deterioration of motor carrier transportation, tries to rationalize it away by stating that:

> Free[119] competition, it is thought, may drive prices down to the place where an inadequate return on cap-

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[117] Appellant's Brief, App. C., p. 85, last par.

[118] Appellant's Brief, pp. 44, 1st par., 61, 1st par.

[119] Appellant's Brief, p. 65, last par.

> ital investment is being realized. But once Georgia has regulated the rate to be charged all private users of the State's carrier system, *no reduction in return to any or all carriers can result from the entrance into the market of a new customer—the United States—bringing with it a surge of unregulated demand.* If the State's carriers are operating at full capacity, then to obtain transportation services the United States must offer any carrier a higher net return than that which the carrier could obtain from dealing with private shippers. If the State's carriers are operating at less than full capacity, the addition of the United States' demand for transportation provides additional revenues from the same equipment, which would not be earned if the United States had not chosen to ship within the State. (Emphasis supplied.)

This is pure fantasy. It completely ignores the cost of labor, the cost of repairs and depreciation of equipment, and other expenses arising out of furnishing transportation for the United States. It is patently fallacious to believe that once a rate of return is established for the regulated segment of a business, such return will not be adversely affected by engaging in "cut-throat" competition for the unregulated segment of the business.

Next, the Appellant complains that if it must abide by state rate regulation in intrastate commerce, it "would have one system covering shipments of household goods which cross State lines (or are within those States not seeking to regulate them), and, depending upon State legislatures, up to 50 systems governing intrastate shipments."[120] However, we should note that under the "cut-throat" competitive conditions sought by the Appellant, federal procurement officers would be continually negotiating and renegotiating rates and advertising and readver-

[120] Appellant's Brief, p. 60, last par.

tising for competitive bids on rates, which rates would be as infinite and varied as the number of carriers interested in doing business with the United States. In sharp contrast to this instability is the state regulation of intrastate commerce under which the tasks of the federal procurement officers would be greatly simplified and expedited because only a relatively small number of governmentally-fixed rate systems would have to be applied. Again, a realistic appraisal works an evaporation of the complaint.

Furthermore, even if we assume *arguendo* the existence of the regulatory burdens complained of by the Appellant, a moment's reflection reveals that the same burdens were inherent in *Penn Dairies*. This decision required federal officers to follow state price regulation and prohibited them from independently negotiating other rates for the mass purchase of milk, and further required that they procure their supplies of milk in accordance with the various applicable state laws, otherwise valid.

In *Davies Warehouse Company v. Bowles*,[121] this Court, in considering the imposition of a substantial administrative burden on a federal official under the Emergency Price Control Act, commented as follows:

> 2. It also is objected that if we consider the status of an industry under state law, the Price Administrator "would have to scrutinize and differentiate many kinds of franchises. Thus the Administrator, as incident to the task of price control, would be called upon to determine in any number of particular instances questions of state law which require the most painstaking examination of statutes and decisions." We are not prepared to deny that in some degree this will be true, for we do not hold that all warehouses, or even that all warehouses regulated in some aspects,

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[121] (1944), 321 U. S. 144, 153 (2), 88 L. ed. 635, 642, r. o. l., 2d par

come within the exemption. We think the Administrator will have to form judgments and that they will be judgments of some difficulty. Simplicity of administration is a merit that does not inhere in a federal system of government, as it is claimed to do in a unitary one. A federal system makes a merit, instead, of the very local autonomy in which complexities are inherent. Nor would the interpretation advocated by the Administrator avoid the necessity of ascertaining and considering rights thought to be possessed under local laws and not likely to be yielded readily. One effect of the Administrator's interpretation would be to postpone study of local laws from consideration in connection with wise administration to the time of litigation, as in this case. Local institutions, customs, and policies will not be overridden without fighting for consideration. The existence and force and function of established institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked in the task of interpretation. At a time when great measures of concentration of direction are concededly necessary, it may be thought more farsighted to avoid paralyzing or extinguishing local institutions which do not seriously conflict with the central government's place. Congress has given no indication that it would draw all such state authority into the vortex of the war power. Nor should we rush the trend to centralization where Congress has not. It could never be more appropriate than now to heed the maxim reiterated recently by the Court that "the extension of federal control into these traditional local domains is a 'delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions.'" *Yonkers v. United States*, No. 109, October

Term, 1943, decided January 3, 1944 (320 U. S. 685, 690, ante, 400, 64 S. Ct. 327); *Palmer v. Massachusetts*, 308 U. S. 79, 84, 84 L. ed. 93, 97, 60 S. Ct. 34, 41 Am. Bankr. Rep. (N. S.) 134. At least in the absence of a congressional mandate to that effect, we cannot adopt a rule of construction, otherwise unjustified, to relieve federal administrators of what we may well believe is a substantial burden but one implied by the terms of the legislation when viewed against the background of our form of government.

The rationale expressed in *Penn Dairies* and *Davies* is reflected in the following decisions: *E. E. Morgan Co. v. Arkansas for use of Phillips County* (1941), 202 Ark. 404, 150 S. W. 2d 736, app. dism. (1941), 314 U. S. 571, 86 L. ed. 463, 62 S. Ct. 77, reh. den. (1941), 314 U. S. 711, 86 L. ed. 567, 62 S. Ct. 175 (Held that a foreign corporation engaged in construction of a levee in Arkansas under Federal contract negotiated outside the State was not exempt from compliance with statutory requirements for doing business in the State of Arkansas); *James Stewart & Co. v. Sadrakula* (1940), 309 U. S. 94, 84 L. ed. 596 (Held that the provisions of a state labor law requiring contractors constructing buildings to board over all open steel tiers for the protection of their employees continue operative in territory over which the United States has acquired exclusive jurisdiction, and are applicable to a contractor constructing a post office therein); *Baltimore & A. R. Co. v. Lichtenberg* (1939), 176 Md. 383, 4 A. 2d 734, app. dism. (1939), 308 U. S. 525, 84 L. ed. 444, 60 S. Ct. 297 (Held that motor carrier who contracted to carry workers for the United States was required to obtain a state permit to act as common carrier on the highways of the state); and *Commonwealth v. Closson* (1918), 229 Mass. 329, 118 N. E. 653, L. R. A. 1918C 929 (Held that United States mail carrier was compelled to obey state traffic laws even though it slowed mail delivery).

In conclusion of this aspect of the case, it seems clear that the United States in acting in accord with Georgia's program of rate regulation is completely free to procure intrastate transportation in such volumes, for such destinations, and at such times as it desires. Therefore, such rate regulation imposes no prohibition on the United States or its officers.

B.

The Criminal Statute Is Inapplicable to Federal Officers.

The Appellant further contends that the state statutes and regulations complained of are inapplicable to the United States because their violation is made a crime in certain instances. This contention is fallacious on several grounds.

The criminal provision involved is Section 68-9911 of the Code of Georgia, which provides as follows:

> 68-9911. Motor common carrier regulations, violation of.—Every officer, agent, or employee of any corporation and every person who violates or fails to comply with the provisions of Chapter 68-6 relating to the regulation of motor common carriers, or any order, rule, or regulation of the Public Service Commission, or who procures, aids, or abets therein, shall be guilty of a misdemeanor (Acts 1931, pp. 199, 208)

In the lower court, the Appellant did not attack this Code Section specifically or raise the criminal statute facet of this case. Consequently, the Georgia Public Service Commission was afforded no fair opportunity to place in evidence an affidavit to the effect that the Code Section has never been utilized in the prosecution of a shipper or an agent acting on behalf of a shipper and that it has never been interpreted as being applicable to shippers. The Courts of Georgia accord great weight to the adminis-

trative interpretation of statutes,[122] and strictly construe criminal statutes against the State.[123] Hence, the attack comes too late at this stage of the litigation.

Furthermore, Code Section 68-9911 shows on its face its inapplicability to shippers and their agents. Several cases of this Court are apposite to such interpretation.

In *United States v. Farrar*,[124] this Court held that the ordinary purchaser of intoxicating liquor fit for beverage purposes, not belonging to that class of persons who are authorized to sell, purchase or otherwise deal with such intoxicating liquor, was not subject to prosecution under Section 6 of the National Prohibition Act for purchasing liquor without a permit. This Court commented upon the justification for such a construction by stating that "Probably it was thought more important to preserve the complete freedom of the purchaser to testify against the seller than to punish him for making the purchase."[125] This Court reached a similar conclusion in *Gebardi v. United States*[126] involving the prosecution of a woman

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[122] *Mathis v. Fulton Industrial Corp.* (1929), 168 Ga. 719, 722, 1 par., 149 S. E. 35; *Carroll v. Wright* (1908), 131 Ga. 728, 730 (4), 63 S. E. 260; *Temple Baptist Church v. Georgia Terminal Co.* (1907), 128 Ga. 669, 680, 58 S. E. 157; *Epping v. City of Columbus* (1903), 117 Ga. 263 (7), 273, 43 S. E. 803; *Miller v. Wilson* (1879), 60 Ga. 505; *Solomon v. Commissioners of Cartersville* (1870), 41 Ga. 157, 161, 2d par.; *Richardson v. Maryland Casualty Co.* (1930), 41 Ga. App. 520, 525, 3d par., 153 S. E. 524; *Board of Education v. Bacon* (1918), 22 Ga. App. 72, 78, 2d par., 95 S. E. 753; *Griner v. Baggs & Perry* (1908), 4 Ga. App. 232 (3a), 235, 1st par., 61 S. E. 147.

[123] *Matthews v. Everett* (1947), 201 Ga. 730, 735, 2d par., 41 S. E. 2d 148; *Wood v. State* (1942), 68 Ga. App. 43 (2a), 21 S. E. 2d 915.

[124] (1930), 281 U. S. 624, 74 L. ed. 1078, 50 S. Ct. 425, 68 A. L. R. 892.

[125] Id., 281 U. S. 634, 2d par., 74 L. ed. 1081, upper r. col.

[126] (1932), 287 U. S. 112, 119, 1st par., 77 L. ed. 206, 209, upper r. col.

under the Mann Act. In *Nigro v. United States*,[127] the Court held on the same rationale that the evidence was insufficient to support a conviction under the Harrison Anti-Narcotic Act of a retail purchaser of narcotics for his own use. The Court achieved a similar result in *United States v. Bowls*,[128] involving a prosecution under a federal conflict of interest statute, of a person who gave compensation to a federal employee.

Georgia Code Section 68-9911 bears a sharp contrast to Sections 2107, 2110, 2111 and 2112 of the California Public Utilities Code, set forth in Appendix B[129] of this Brief. These California criminal provisions were considered in *United States v. Public Utilities Commission of the State of California*[130] and in *Public Utilities Commission of the State of California v. United States*.[131] These provisions are far more extensive than Georgia Code Section 68-9911. For instance, the penalties provided by Section 2112 were applicable to every offender whether acting individually or as an officer, agent or employee of a non-utility corporation. The breadth of such a provision would clearly include an offending shipper.[132] On the other hand, the Georgia statute obviously lacks such breadth and sophistication of coverage.

In any event, it seems clear that a state criminal statute would have no applicability to a federal officer in the performance of his official duties. There is a clear distinction between a state, on one hand, imposing an indirect burden

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[127] (C. C. A.—8th—1941), 117 F. 2d 624, 628 (1).

[128] (D. C.—D. Maine—1958), 138 F. Supp. 237, 251 (9).

[129] Infra, p. ii.

[130] (D. C.—N. D.—Cal.—1956), 141 F. Supp. 168.

[131] (1938), 355 U. S. 534, 2 L. ed. 470, 78 S. Ct. 440; reh. den. 356 U. S. 925, 2 L. ed. 2d 760, 78 S. Ct. 713.

[132] Id., 355 U. S. 538, 2d par., 2 L. ed. 2d 474, 1st col., 2d par.

on the Federal Government by regulating carriers doing business with it, and, on the other hand, interrupting the acts of the Federal Government by arresting a federal officer in the performance of his official duties, the latter of course being constitutionally prohibited.[133] Even if a state should attempt to so apply such a statute, there would be time enough to properly dispose of such an attempt.

VI.

Penn Dairies and *Public Utilities* are in Harmony and the Facts in This Case are Governed by *Penn Dairies*.

The doctrine evinced by *Penn Dairies*, *King & Boozer*, *Dravo*, *O'Keefe* and analogous decisions, demonstrate that an indiscriminate and incidental economic or administrative burden placed on the United States as a result of state regulation or taxation is not unconstitutional, provided there is no clear congressional intent shown to immunize against such a burden. The congressional immunization question is foreclosed in this case because the statutes considered herein are analogous to those construed by the Court in *Penn Dairies*. Under such circumstances, the amount of the economic burden is not a determining factor as is illustrated by the tax decisions which resulted in enormous economic burdens being placed on the United States.

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[133] *Johnson v. Maryland* (1920), 254 U. S. 51, 65 L. ed. 126, 41 S. Ct. 16 (Post office employee held immune from arrest for operating a government vehicle in carriage of mail without state driver's license); *Ohio v. Thomas* (1899), 173 U. S. 276, 283, 3d par., 43 L. ed. 699, 701, 1. col., last par., 19 S. Ct. 453 (Governor of a federal soldier's home held immune from arrest for serving oleomargarine to inmates of the home without displaying placard advertising its use as required by state law); *Cunningham v. Neagle* (1890), 135 U. S. 1, 75, 2d par., 34 L. ed. 55, 75, r. col., 2d par., 10 S. Ct. 658 (Federal marshal held immune from arrest by state officers for commission of homicide while protecting a Justice of this Court).

But such burdens are fair. Justice Holmes in his opinion in *Panhandle* explained why when he stated: "It (United States) avails itself of the machinery furnished by the state and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges that it uses. It has no better or other right to use them than anyone else."

Georgia's scheme of regulating motor carrier transportation is similar to that adopted by the vast majority of her sister states. The public interest sought to be served in such regulation "lies inter alia in providing safe and efficient transportation equipment; in the maintenance of adequate transportation facilities and service, regularly sustained in any specific territory or area; in providing specialized service essential for handling and delivering special types of merchandise or commodities; in the avoidance of undue and unnecessary travel and traffic congestion on the public highways; and in the maintenance of such reasonable rates and charges for the service as will give the shipper and the public using the commodity shipped the best possible economic advantage consistent with successful operation, taking into consideration in all these respects the natural advance in the quality of service in the field of transportation."[134] A significant purpose in all of such regulation is to secure adequate, sustained service

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[134] *Columbus-Cincinnati Trucking Company v. Public Utilities Commission* (1943), 141 Ohio St. 228, 47 N. E. 2d 623, 626 (6). See also: *Re Southern Pacific Motor Transport Company* (Cal. R. Com.—1928), P. U. R. 1929A, 193, 199, 24 pars.; *Seaboard Air Line Ry. Co. v. Wells* (1930), 100 Fla. 1027, 130 So. 587, 591 (3), P. U. R. 1931A, 433; *Omaha Transit Company v. Briggs* (1955), 167 Neb. 703, 94 N. W. 2d 461, 467 (2), 28 P. U. R. 3d 29; *State v. Queen City Coach Company* (1951), 233 N. C. 119, 63 S. E. 2d 113, 115 (1), 88 P. U. R. N. S. 284; *Taylor-Edwards Warehouse & Transfer Co. v. Dept. of Public Service* (1945), 22 Wash. 2d 565, 569, 157 P. 2d 309, 310 (3), 58 P. U. R. N. S. 521; *Re United Parcel Service of Seattle* (Wash. Pub. Ser. Com.—1955), 12 P. U. R. 3d 22, 27 (2); 60 C. J. S., Motor Vehicles, Sec. 44 (b), p. 187.

for the public at the *lowest reasonable cost* without unjust discrimination or *destructive competitive practices*.[135]

When the United States avails itself of an intrastate transportation system regulated by a state, the United States should pay its fair share of the cost necessary to adequately maintain such a system. The theory of state regulation of rates is to fix them at the lowest reasonable level necessary to maintain the economic stability of the industry regulated. The United States is the biggest spender in the Nation. To permit this tremendous economic force to penetrate the rate floors established by state regulation would stimulate destructive competition in a regulated industry. The effect would be a heavy economic depressant operating on a national scale. Should such a result be readily inferred from congressional legislation? The Court has answered the question in the negative on numerous occasions.

The following words of the Court, spoken through Justice Frankfurter in *Palmer v. Massachusetts*,[136] are apposite here:

> And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government.

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[135] Id.

[136] (1939), 308 U. S. 79, 83, 2d par., 84 L. ed. 93, 97, r. col., 2d par.

> To be sure, in recent years Congress has from time to time exercised authority over purely intrastate activities of an interstate carrier when, in the judgment of Congress, an interstate carrier constituted, as a matter of economic fact, a single organism and could not effectively be regulated as to some of its interstate phases without drawing local business within the regulated sphere. But such absorption of state authority is a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions. Therefore, in construing legislation this court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress.

On the other hand, when the United States contracts for the services of a regulated industry and pays, as other purchasers, rates lawfully established by a state, the effect is to stimulate the national economy. The United States then contributes its fair share to the proper maintenance of the regulated industry which cannot afford to take less because of regulation. The result is consonant with the well recognized aims of federal and state governments to maintain a vibrant national economy.

The latter philosophy of government is conducive to maintaining a strong commercial transportation industry in the United States. General Lasher emphasized the military necessity for such an industry when he testified that:

> "The[137] policy of the Department of Defense is to utilize the commercial transportation industry of the United States to the fullest extent possible."

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[137] *United States v. Public Utilities Commission of State of California* (D. C.—N. D. Cal.—1956), 141 F. Supp. 168, 174, 1 col., 2d par.

> "This policy," the witness continued, "has been adopted primarily on the theory that the broader that common carrier base in the United States is, the better prepared transportationwise we will be in the case of emergency, and therefore we utilize military-owned transportation to a minimum extent and only where commercial transport cannot meet the requirements of the particular traffic involved."

Furthermore, the President of the United States has recently emphasized that "An efficient and dynamic transportation system is vital to our domestic economic growth, productivity and progress."[138]

In this case, as in *Penn Dairies*, the price regulation affects the United States only by increasing the price it pays. In *Penn Dairies* the Court recognized that the control of prices in the milk industry is clearly within the police power of the states since the public health is so directly affected. In this case, the regulation of rates in the intrastate transportation industry is also clearly within the police power of the states because the adequacy of the industry and its consequent ability to properly serve the general public is directly affected. The burden placed on the United States is only incidental to the enforcement of state milk and motor carrier regulations and the increased cost in each case is not one which was expressly made to discriminate against the United States, nor is it one which interferes with the performance of a federal function.

The Appellant attempts to distinguish this case and *Penn Dairies* on the ground that in *Penn Dairies* the army could avoid state price regulation by procuring a supply of milk from outside the state, but that such an alternative is unavailable to the Federal Government in this

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[138] President's Message on Transportation, dated April 4, 1962, infra, App. C., at p. iv.

case.[139] Such a distinction is irrelevant because obviously it was not a determining factor in the Court's disposition of *Penn Dairies*. Furthermore, the Court disregarded the obvious inquiry as to whether the Federal Government would be faced with a similar regulation of the sale of milk in other states.

In *Public Utilities*, the state had enacted legislation which directly regulated the United States, by name, when it should apply for reduced rates for the transportation of property. The state statute provided that "The (state) commission may permit common carriers to transport property at reduced rates for the United States . . . to such extent and subject to such conditions as it may consider just and reasonable." The legal effect of such a statute is to place the United States under the heel of the state when applying for reduced rates. When a state formally addresses its regulation to the United States the burdens presented are no longer indirect, indiscriminate or incidental in the constitutional sense, irrespective of how favorable such an address might be in a purely economic sense.[140] This direct interference by a state with the United States was relied on heavily in the decisions of the lower Court and this Court in *Public Utilities*.

By contrast, the Georgia statutes do not name the United States, but operate indiscriminately upon all shippers. The Georgia statutes do not interfere with the procurement of transportation by the United States, but merely impose an indiscriminate and incidental burden on it.

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[139] Appellant's Brief, p. 67, 1st par.

[140] We should note here that Georgia Code Section 68-613 (Appellant's Brief, App. A., p. 69), is sufficiently broad to permit the Georgia Public Service Commission to promulgate reduced rates for large volume shipments upon a showing of economic feasibility.

Next, we should note that in *Public Utilities* the property being transported consisted of military weapons and supplies. The District Court and this Court interpreted the state regulation as interfering seriously with the flexibility, speed and security requirements of moving military property. This is a crucial consideration during the current Cold War when espionage is being conducted in this Country by foreign powers. The opportunity for total war or limited conflict is ever present. Never in our history have the needs of immediate national defense been so synonymous with national survival. Such is the product of the thermonuclear and intercontinental ballistic missile age. Obviously, a state cannot interfere with the United States in the performance of its paramount responsibility of providing for the national defense.

By contrast, this case involves the intrastate transportation of the household goods and personal effects of civilian employees of the United States Department of Public Health. The movements here are remote from the considerations of national defense as compared with the military movements in *Public Utilities*. In this case, the national interest is more concerned with the maintenance of an economically sound commercial transportation system and its effect on the national economy and defense, than with the indiscriminate and incidental burden placed on the United States. The District Court dramatically illustrated this distinction when it opined that "There is a constitutional difference between a milk can and a hydrogen bomb!"[141]

Furthermore, *Public Utilities* involved the transportation of substantial quantities of exotic military weapons and supplies for which no commodity rates had been de-

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[141] *United States v. Public Utilities Commission of the State of California* (D. C.—N. D. Cal.—1956), 141 F. Supp. 168, 180, r. col., 2d par.

vised. Consequently, under the California regulations such military property would have to move under the higher class rates. On the other hand, the vast majority of private property moves at commodity rates because such property involves the common articles of commerce for which commodity rates have been devised. Therefore, the effect of such rate classification by California would impose a substantial economic discrimination against the United States in comparison with private shippers because of the uniqueness of much of the military property transported.

By contrast, this case involves the transportation of household goods and personal effects which are frequent items of commerce throughout the Nation. Georgia, like all the states which regulate the rates for the transportation of property, has devised commodity rates. Consequently, the economic burden imposed upon the United States is the same burden imposed upon private shippers.

The *Penn Dairies* doctrine is essential in preserving the vitality of our dual form of government, just as the *Public Utilities* doctrine is essential in prohibiting state interference with the performance of federal functions. The two doctrines coexist under our Federal Constitution. The over-expansion of either doctrine results in debilitating the desired vitality of the governmental victim.

In this case the Court is called upon to determine which doctrine rules the facts presented. The answer of the Court, while directed to a Georgia factual situation, will have nation-wide influence. Consequently, the question presented is one of degree and of balancing national interests.

On one side we have the interest of preserving and stimulating the economy of the transportation industry which is an indispensable part of the national economy and defense. On the other side, we have an indiscriminate and incidental burden imposed on the United States, as on

other shippers, who avail themselves of an intrastate transportation system. The burden is merely the cost of supporting the system.

There is no question of the importance to the Nation of an adequate and prosperous transportation system. Such a system requires that "the users of transportation services should bear the full cost of the services they use, whether those services are provided privately or publicly."[142]

The unmistakable policy of the Congress, prior decisions of the Court, and the national welfare demand that this case be governed by the *Penn Dairies* doctrine.

CONCLUSION.

The Judgment of the United States District Court for the Northern District of Georgia, sought to be reviewed in this cause, should be affirmed.

Respectfully submitted,

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[142] President's Message on Transportation, dated April 4, 1962, infra, App. C., at p. vii.

APPENDIX A.

Extract From Title 10, U. S. C. A.

1201. Advertisement for proposals; considerations governing letting of contracts. Except in cases of emergency or where it is impracticable to secure competition, or in cases otherwise provided for, the purchase of all supplies for the use of the various departments, and posts of the Army and of the branches of the Army service shall only be made after advertisement; and said supplies shall be purchased where the same can be purchased the cheapest, quality and cost of transportation and the interests of the Government considered (Mar. 2, 1901, c. 803, 31 Stat. 905. See section 218 of Title 5).

Extract from Title 41, U. S. C. A.

5. Advertisements for proposals for purchases and contracts for supplies or services for departments of Government. Except as otherwise provided by law all purchases and contracts for supplies or services in any of the departments of the Government and purchases of Indian supplies, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals (R. S., § 3709; June 25, 1910, c. 431, § 23, 36 Stat. 861).

APPENDIX B.

The following sections are extracted from the California Public Utilities Code:

§ 2107. Residuary penalty.—Any public utility which violates or fails to comply with any provision of the Constitution of this State or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500) nor more than two thousand dollars ($2,000) for each offense (Stats. 1951, c. 764, p. 2098, § 2107).

§ 2110. Violation by officer, agent, or employee of public utility; misdemeanor; penalty.—Every officer, agent or employee of any public utility who violates or fails to comply with, or who procures, aids or abets any violation by any public utility of any provision of the Constitution of this State or of this part, or who fails to comply with any part of any order, decision, rule, direction, demand or requirement of the commission, or who procures, aids or abets any public utility in such violation or non-compliance in a case in which a penalty has not otherwise been provided for such officer, agent or employee is guilty of a misdemeanor and is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment (Stats. 1951, c. 764, p. 2098, § 2110).

§ 2111. Penalty for violation by corporation not a public utility.—Every corporation, other than a public utility, which violates any provision of this part, or which fails to comply with any part of any order, deci-

sion, rule, direction, demand, or requirement, of the co mission, in a case in which a penalty has not otherwise been provided for such corporation, is subject to a penalty of not less than five hundred dollars ($500) nor more than two thousand dollars ($2,000) for each offense (Stats. 1951, c. 764, p. 2099, § 2111).

§ 2112. Violation by officer, agent or employee of corporation not a public utility; misdemeanor; penalty. Every person who, either individually or acting as an officer, agent or employee of a corporation other than a public utility, vio ates any provision of this part, or fails to comply with any part of any order, decision, rule, direction, demand or requirement of the commission, or who procures, aids or abets any public utility in such violation or non-compliance, in a case in which a penalty has not otherwise been provided for such person, is guilty of a misdemeanor, and is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment (Stats. 1951, c. 764, p. 2099, § 2112).

APPENDIX C.

THE WHITE HOUSE.

MESSAGE ON TRANSPORTATION.

To the Congress of the United States:

An efficient and dynamic transportation system is vital to our domestic economic growth, productivity and progress. Affecting the cost of every commodity we consume or export, it is equally vital to our ability to compete abroad. It influences both the cost and the flexibility of our defense preparedness, and both the business and recreational opportunities of our citizens. This Nation has long enjoyed one of the most highly developed and diversified transportation systems in the world, and this system has helped us to achieve a highly efficient utilization of our manpower and resources.

Transportation is thus an industry which serves, and is affected with, the national interest. Federal laws and policies have expressed the national interest in transportation particularly in the last 80 years: through the promotion and development of transportation facilities, such as highways, airways, and waterways; through the regulation of rates and services; and through general governmental policies relating to taxation, procurement, labor and competition. A comprehensive program for transportation must consider all of these elements of public policy.

During the last session of Congress, action was taken to place our Federal-aid highway program on a sounder fiscal basis. Initial steps were taken to improve the operations of our regulatory agencies through reorganization. A beginning was also made toward meeting the needs of our cities for mass transportation. By Executive Order,

I recently assigned to the Department of Commerce authority for emergency transportation planning.

But pressing problems are burdening our national transportation system, jeopardizing the progress and security on which we depend. A chaotic patchwork of inconsistent and often obsolete legislation and regulation has evolved from a history of specific actions addressed to specific problems of specific industries at specific times. This patchwork does not fully reflect either the dramatic changes in technology of the past half-century or the parallel changes in the structure of competition.

The regulatory commissions are required to make thousands of detailed decisions based on out-of-date standards. The management of the various modes of transportation is subjected to excessive, cumbersome and time-consuming regulatory supervision that shackles and distorts managerial initiative. Some parts of the transportation industry are restrained unnecessarily; others are promoted or taxed unevenly and inconsistently.

Some carriers are required to provide, at a loss, services for which there is little demand. Some carriers are required to charge rates which are high in relation to cost in order to shelter competing carriers. Some carriers are prevented from making full use of their capacity by restrictions on freedom to solicit business or adjust rates. Restraints on cost-reducing rivalry in rate-making often cause competition to take the form of cost-increasing rivalry—such as excessive promotion and traffic solicitation, or excessive frequency of service. Some carriers are subject to rate regulation on the transportation of particular commodities while other carriers, competing for the same traffic, are exempt. Some carriers benefit from public facilities provided for their use, while others do not; and of those enjoying the use of public facilities, some

bear a large part of the cost, while others bear little or none.

No simple Federal solution can end the problems of any particular company or mode of transportation. On the contrary, I am convinced that less Federal regulation and subsidization is in the long run a prime prerequisite of a healthy inter-city transportation network. The constructive efforts of State and local governments as well as the transportation industry will also be needed to revitalize our transportation services.

This Administration's study of long-range transportation needs and policies convinces me that current Federal policies must be reshaped in the most fundamental and far-reaching fashion. While recognizing that a revision of the magnitude required is a task to which the Congress will wish to devote considerable time and effort, I believe the recommendations below are of sufficient urgency and importance that the Congress should begin consideration of them at the earliest practicable date. If direct and decisive action is not taken in the near future, the undesirable developments, inefficiencies, inequities, and other undesirable conditions that confront us now will cause permanent loss of essential services or require even more difficult and costly solutions in the not-too-distant future.

A Basic National Transportation Policy.

The basic objective of our nation's transportation system must be to assure the availability of the fast, safe and economical transportation services needed in a growing and changing economy to move people and goods, without waste or discrimination, in response to private and public demands at the lowest cost consistent with health, convenience, national security and other broad public objectives. Investment or capacity should be neither substantially above nor substantially below these requirements—

for chronic excess capacity involves misuse of resources, and lack of adequate capacity jeopardizes progress. The resources devoted to provision of transportation service should be used in the most effective and efficient manner possible; and this, in turn, means that users of transport facilities should be provided with incentives to use whatever form of transportation which provides them with the service they desire at the lowest total cost, both public and private.

This basic objection can and must be achieved primarily by continued reliance on unsubsidized, privately owned facilities, operating under the incentives of private profit and the checks of competition to the maximum extent practicable. The role of public policy should be to provide a consistent and comprehensive framework of equal competitive opportunity that will achieve this objective at the lowest economic and social cost to the nation.

This means a more coordinated Federal policy and a less segmented approach. It means equality of opportunity for all forms of transportation and their users and undue preference to none. It means greater reliance on the forces of competition and less reliance on the restraints of regulation. And it means that, to the extent possible, the users of transportation services should bear the full costs of the services they use, whether those services are provided privately or publicly.

For some seventy-five years, common carriage was developed by the intention of Congress and the requirements of the public as the core of our transport system. This pattern of commerce is changing—the common carrier is declining in status and stature with the consequent growth of the private and exempt carrier. To a large extent this change is attributable to the failure of Federal policies and regulation to adjust to the needs of the shipping and consuming public; to a large extent it is

attributable to the fact that the burdens of regulation are handicapping the certificated common carrier in his efforts to meet his unregulated competition. Whatever the cause, the common carrier with his obligation to serve all shippers —large or small—on certain routes at known tariffs and without any discrimination performs an essential function that should not be extinguished.

Considerable research and analysis, going far beyond our present findings, will be required before we know enough about the costs and other characteristics of various forms of transportation to guarantee the achievement of these objectives in full. In the meantime, it is clear that the following fundamental reforms in our transportation policy are needed now.

Part I. Intercity Transportation.

Our system of intercity public transportation—including railroads, trucks, buses, ships and barges, airplanes and pipelines—is seriously weakened today by artificial distortions and inefficiencies inherent in existing Federal policies. Built up over the years, they can be removed only gradually if we are to mitigate the hardships that are bound to arise in any program of far-reaching adjustment.

As an initial step, I am requesting the Chairmen of the Civil Aeronautics Board, the Interstate Commerce Commission and the Federal Maritime Commission to meet at frequent intervals to discuss regulatory problems affecting the various modes of transportation and to seek coordinated solutions in the form of legislation or administrative action that will improve the regulatory process.

(A) *Equal competitive opportunity under diminished regulation.*

(1) *Bulk Commodities*—At present, the transportation of bulk commodities by water carriers is exempt from all rate regulation under the Interstate Commerce Act, including the approval of minimum rates; but this exemption is denied to all other modes of transportation. This is clearly inequitable both to the latter and to shippers—and it is an inequity which should be removed. *Extending to all other carriers the exemption from the approval or prescription of minimum rates* would permit the forces of competition and equal opportunity to replace cumbersome regulation for these commodities, while protecting the public interest by leaving intact the ICC's control over maximum railroad rates and other safeguards (such as the prohibition against discrimination, and requirements on car service and common carrier responsibility). While this would be the preferable way to eliminate the existing inequality, Congress could elect to place all carriers on an equal footing by repealing the existing exemption—although this would result in more, instead of less, regulation and very likely in higher though more stable rates. Whichever alternative is adopted, these commodities are too important a part of carrier traffic to continue to be governed so unequally by Federal rate regulation.

(2) *Agricultural and fishery products*—An exemption similar to that described above, and now available only to motor carriers and freight forwarders, relates to agricultural and fishery products. *This exemption from minimum rates should also be extended to all carriers.* Here too, the ICC should retain control of maximum railroad rates and certain other controls to protect the public interest in those areas where there is no effective truck or water carrier competition to keep rates down.

The combined effect of extending these bulk and agricultural exemptions will be to reduce drastically and equalize fairly the regulation of freight rates in this country. Freed to exercise normal managerial initiative, carriers will be able to rationalize their operations and reduce costs; and shippers should consequently enjoy a wider choice, improved service and lower rates.

(3) *Intercity passenger rates*—The traveling public, like the commercial shipper, is also uninterested in paying higher rates to subsidize weak segments of the transportation industry. Chronic over-capacity and deficits can be ended in the long run only in an industry made fit, lean and progressive by vigorous competition and innovation. But this is not possible as long as Federal agencies fix uniform minimum rates for passenger travel. I recommend, therefore, that the Congress enact legislation which would ventually *limit the control of intercity passenger rates to the establishment of maximum rates only.* In the case of the airlines, it may be preferable to initiate this program on a gradual or temporary basis under existing authority.

To prevent the absence of minimum rate regulation under the above three proposals from resulting in predatory, discriminatory trade practices or rate wars reflecting monopolistic ambitions rather than true efficiency, the Congress should make certain that such practices by carriers freed from minimum rate regulations would be covered by existing laws against monopoly and predatory trade practices.

While the above three recommendations relate to the most critical—and controversial—problems of unnecessary or unequal regulatory curbs on transportation, other changes in the Interstate Commerce Act and the Federal Aviation Act are needed consistent with these same principles. I recommend that legislation be enacted to:

(4) Assure all carriers the right to ship vehicles or containers on the carriers of other branches of the transportation industry at the same rates available to non-carrier shippers. This change will put the various carriers in a position of equality with freight forwarders and other shippers in the use of the promising and fast growing piggy-back and related techniques.

(5) Repeal the provision of the Interstate Commerce Act which now prevents a railroad from hauling cargo it owns. The need for this provision, which goes back to the days of oppressive railroad monopoly, has largely passed; and its current effect is to handicap the railroads in competing with other modes of transportation. The anti-trust laws can insure protection against *the possible abuse by a* railroad of its dual status as shipper and carrier.

(6) Direct the regulatory agencies to sanction experimental freight rates, modifications and variations in existing systems of classification and documentation, and new kinds or combinations of service.

* * * * * * *

(C) *Even-handed Government promotion of inter-city transportation.*

To achieve a better balance of Federal promotional programs:

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(3) The Federal Government is a major user of transportation services. To assure the greatest practical use of the transportation industry by government, I am directing all agencies of the Government, in meeting their own transport needs, to use authorized commercial facilities in all modes of transportation within the limits of economical and efficient operations and the requirements of military readiness.

(4) I also recommend that the Post Office Department be given greater flexibility in arranging for the transportation of mail by motor vehicle common carrier.

* * * * * * *

Conclusion.

The troubles in our transportation system are deep; and no just and comprehensive set of goals—which meets all the needs of each mode of transportation as well as shippers, consumers, taxpayers and the general public—can be quickly or easily reached. But few areas of public concern are more basic to our progress as a nation. The Congress and all citizens, as well as all Federal agencies, have an increasing interest in and an increasing responsibility to be aware of the shortcomings of existing transportation policies; and the proposals contained in this message are intended to be a constructive basis for the exercise of that responsibility.

The difficulty and the complexity of these basic troubles will not correct themselves with the mere passage of time. On the contrary, we cannot afford to delay further. Facing up to the realities of the situation, we must begin to make the painful decisions necessary to providing the transportation system required by the United States of today and tomorrow.

JOHN F. KENNEDY.

THE WHITE HOUSE.

April 5, 1962.